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In the Supreme Court of the United States

OCTOBER TERM, 1991

PHILLIPS PETROLEUM CO., CHEVRON U.S.A. INC., and CONOCO INC., PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Pursuant to the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. §§ 1331-1356, the Minerals Management Service ("MMS") of the Department of the Interior leases submerged lands on the outer continental shelf to natural gas producers in return for a royalty. The amount of the royalty is tied directly to the price producers receive for their gas, which typically is the maximum price permitted under the Natural Gas Policy Act, 15 U.S.C. §§ 3301-3432, as calculated pursuant to Federal Energy Regulatory Commission regulations. In recognition that producers occasionally make erroneous overpayments, Section 10(a) of the OCSLA, 43 U.S.C. § 1339(a), permits gas producers to seek refunds of any royalty payment "in excess of the amount [they were] lawfully required to pay," if the refund request "is filed * * * within two years after the making of the payment * * *."

The question presented is:

Whether the two-year limitations period contained in Section 10(a) begins to run at the time a gas producer makes its royalty payment, even if the producer would have no right to a refund at that time.

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

In addition to the parties listed in the caption, Pennzoil Co., Pogo Producing Co., Shell Offshore, Inc., Mobil Oil Corp., Mobil Oil Exploration & Producing Texas & New Mexico, Inc., Mobil Oil Exploration & Producing North America Inc., Exxon Company, U.S.A., a division of Exxon Corporation, Amoco Production Company, and Columbia Gas Development Corporation were plaintiffs-appellees in the proceedings below.

Petitioner Phillips Petroleum Co., a publicly held corporation, has no parent company. Its non-wholly owned subsidiaries are listed in Appendix G, *infra*.

Petitioner Chevron U.S.A. Inc. is a wholly owned subsidiary of Chevron Corporation, a publicly held corporation. The Chevron-affiliated companies with publicly traded shares or debt securities are listed in Appendix H, *infra*.

Petitioner Conoco Inc. is a wholly owned subsidiary of E.I. du Pont de Nemours and Company, a publicly held corporation. The Seagram Company Ltd., a publicly held corporation, through its wholly owned subsidiary companies, owns approximately 23% of the common stock of E.I. du Pont de Nemours and Company. Conoco Inc.'s publicly held affiliates are: Biotech Research Laboratories, Inc., Conoco Exploration Ltd. (a limited partnership), Du Pont Canada Inc., and Molecular Biosystems Inc.

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PETITION FOR A WRIT OF CERTIORARI

Phillips Petroleum Co., Chevron U.S.A. Inc., and Conoco Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 923 F.2d 830. The opinion of the Claims Court (App., *infra*, 11a-24a) is reported at 17 Cl. Ct. 537. The opinion of the Department of Interior Board of Land Appeals (App., *infra*, 27a-58a) is reported at 96 I.B.L.A. 149. The decision of the Minerals

Management Service (App., *infra*, 59a-62a) is reported at 49 Fed. Reg. 47,120.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1991 (App., *infra*, 1a), and a timely petition for rehearing was denied on April 4, 1991 (App., *infra*, 9a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

STATUTORY PROVISION INVOLVED

The relevant provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339(a), provides in pertinent part:

> [W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment * * *.

STATEMENT

Petitioners lease submerged lands on the outer continental shelf from the Minerals Management Service ("MMS") of the Department of the Interior in order to explore for and extract natural gas. Petitioners sell some or all of the gas they extract to pipelines and other "first purchasers" at prices up to the maximum amount permitted under the Natural Gas Policy Act ("NGPA"), 15 U.S.C. §§ 3301-3432, as determined pursuant to procedures established by the Federal Energy Regulatory Commission ("FERC"). Petitioners pay MMS a royalty that is directly tied to the prices they charge first purchasers under the NGPA.

For the period between December 1, 1978 and August 9, 1983, the prices that first purchasers paid to petitioners and other producers were based upon a FERC-mandated methodology that was more favorable to producers than the methodology previously in effect. For that same period, producers, including petitioners, paid MMS royalties based on the prices computed under FERC's methodology. On August 9, 1983, however, the United States Court of Appeals for the District of Columbia Circuit struck down FERC's methodology as unauthorized by the NGPA and ordered retroactive reinstatement of the previous method for determining gas prices. FERC in turn required gas producers to reimburse gas purchasers for the difference between the prices charged under the invalidated method and the lower prices that would have been charged under the prior method.

As a result of the FERC order, the prices upon which petitioners and other producers had based their royalty payments to MMS no longer reflected the amount they actually received. Accordingly, numerous producers, including petitioners, sought refunds of the difference between the royalties they actually paid and the royalties they would have paid under the previous method of determining gas prices. MMS denied a substantial proportion of the claims as untimely under Section 10(a) of the Outer Continental Shelf Lands Act ("OCSLA"), 43 U.S.C. § 1339(a). That provision provides that "when it appears to the satisfaction of the Secretary [of the Interior]" that a producer has made a royalty payment "in excess of the amount he was lawfully required to pay," the producer is entitled to a refund of "the excess," if it files "a request for repayment of such excess * * * within two years after the making of the payment."

The issue in this case is whether Section 10(a)'s two-year limitations period runs from the time a producer makes its royalty payments even when, as here, the royalty payments were properly calculated at the time

they were made and the producer had no right to a refund until some later date.[1]

1. *Gas Leases Under The OCSLA.* Pursuant to the OCSLA, 43 U.S.C. §§ 1331-1356, MMS leases submerged federal lands on the outer continental shelf to oil and gas producers. The statute fixes the royalty that the producers must pay MMS at no less than 12½% of the "amount or value of the production saved, removed, or sold." 43 U.S.C. § 1337(a)(1)(A).[2] Throughout the time period relevant to this case, MMS equated the value of gas for royalty purposes with the amount that producers actually received for their gas from their purchasers. See 30 C.F.R. § 206.150 (1983). Typically, producers charged and received the maximum lawful price established by Congress in the NGPA as calculated according to methods established by FERC. Thus, under the OCSLA, the royalties paid by producers to MMS were tied directly to the prices they charged first purchasers, and the prices they charged first purchasers were calculated using methods mandated by FERC.

2. *FERC's Efforts To Implement The NGPA's Ceiling Prices.* Effective December 1, 1978, the NGPA established the maximum lawful price for the first sale of various categories of natural gas, including natural gas

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[1] There is no question that when the amount of a royalty payment is not properly calculated—*i.e.*, when the royalty payor has made an accounting error—the limitations period runs from the date of the payment because the payment is in excess of the amount required by law at the time it is made. Here, however, petitioners committed *no* errors; in accordance with MMS regulations and the terms of their leases, they properly calculated their royalty payments based on the amount they actually received for their gas and only became entitled to a refund *after* their gas prices were reduced retroactively.

[2] Most lease contracts, including the bulk of those entered into by petitioners, actually provided for royalties that significantly exceeded the 12½% statutory floor. Because the exact percentage paid by producers varied from contract to contract and is not relevant to the issue in this case, we will use the 12½% figure throughout this petition in order to simplify the discussion.

produced from leases of outer continental shelf lands. See, *e.g.*, 15 U.S.C. § 3312. The statute delegated authority to FERC to implement and enforce the ceiling prices. 15 U.S.C. §§ 3411-3414.

The NGPA's ceiling prices are stated as a function of the energy content of the gas (dollars per million British thermal units).[3] See, *e.g.*, 15 U.S.C. § 3312(b). However, the statute does not dictate a method for determining energy content, which can vary significantly from gas stream to gas stream depending upon the amount of water vapor and other noncombustible constituents of the gas.

Prior to the enactment of the NGPA, FERC's predecessor agency, the Federal Power Commission ("FPC"), had required producers to determine energy content under hypothetical conditions that assumed the gas was saturated with water vapor. This methodology—commonly known as "the wet rule"—overstated the actual amount of water in any particular gas stream and concomitantly understated the energy content of the gas. See *Interstate Natural Gas Ass'n of America* v. *FERC*, 716 F.2d 1, 5 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (*"INGAA"*).

When FERC replaced the FPC and assumed responsibility for implementing the ceiling prices set forth in the NGPA, it published an interim regulation that appeared to retain the wet rule. See 43 Fed. Reg. 56,448, 56,550 (1978). The regulation's effective date was December 1, 1978, the effective date of the NGPA itself. *Id.* at 56,536.

When FERC issued the final regulation on July 16, 1980, however, it indicated in the summary that the wet rule methodology set forth in the regulation merely described the standard conditions for measuring the energy

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[3] A British thermal unit is defined as the amount of energy necessary to raise the temperature of one pound of water one Fahrenheit degree.

content of natural gas. 45 Fed. Reg. 49,077, 49,080 (1980). It made clear that "the results obtained under test conditions, be they those in the rule or others, must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas." *Ibid.* This requirement that the price of gas reflect actual energy content rather than the energy content under hypothetical, saturated conditions has been dubbed "the dry rule."

In an order issued on April 24, 1981, FERC rejected the motions of gas purchasers to reconsider its endorsement of the dry rule and indicated that it considered its announcement of the dry rule merely to clarify its interim regulation. It therefore made the dry rule retroactive to December 1, 1978. See 46 Fed. Reg. 24,537, 24,543 (1981). On August 20, 1981, FERC stayed the retroactive application of the dry rule for the period from December 1, 1978 through April 24, 1981 to reconsider the retroactivity issue. 46 Fed. Reg. 45,599 (1981). On December 24, 1981, FERC reaffirmed its decision to apply the dry rule retroactively to December 1, 1978. 47 Fed. Reg. 614 (1982).

3. *The Effect Of FERC's Varying Methodologies For Determining Energy Content On Gas Prices And Royalty Payments.* From the effective date of the NGPA, December 1, 1978, through July 1980, the natural gas industry and MMS acted on the assumption that FERC had mandated use of the wet rule for calculating the energy content and ceiling price of gas. Throughout that period, first purchasers paid gas prices based on the wet rule, and producers paid MMS royalties based on those wet-rule prices.

As a result of FERC's July 1980, April 1981, and December 1981 orders requiring use of the dry rule, the maximum lawful price of gas increased both prospectively and retroactively. During that period, gas purchasers began paying higher prices for newly-acquired gas and making retroactive payments to correct the payments they previously had made under the wet-rule calculations.

The producers in turn began paying higher royalties to MMS and making retroactive adjustments to royalty payments that had been based on wet-rule prices.

4. *The Challenge To The Dry Rule And Its Impact On Gas Prices.* In June 1981, several gas purchasers brought a challenge to the dry rule in the D.C. Circuit. On August 9, 1983, that court struck down the dry rule as unauthorized by the NGPA and ordered FERC to reinstate the wet rule retroactive to December 1, 1978. See *INGAA*, *supra.* On May 3, 1984, shortly after this Court denied FERC's petition for certiorari in the *INGAA* case, FERC issued an interim rule requiring gas producers to reimburse first purchasers for the difference between the price they actually paid under the dry rule and the price they should have paid under the wet rule. 49 Fed. Reg. 19,293 (1984). Several months later, FERC issued a final rule containing the same requirement. 49 Fed. Reg. 37,735 (1984). Thereafter, the producers began reimbursing purchasers through credits and refunds.

5. *The Producers' Efforts To Obtain Refunds.* Because the D.C. Circuit's decision had the effect of retroactively reducing the price of gas, the royalty payments that producers had made for the period from December 1, 1978 to August 9, 1983 no longer reflected the price the producers actually received. Accordingly, the producers sought refunds (or credits) of the difference between the royalties they actually paid to MMS and the royalties they would have paid had the invalid FERC methodology never been imposed.

Some producers filed requests for refunds (or credits) immediately after the D.C. Circuit rendered its decision. In a letter dated November 9, 1983, however, MMS indicated that it would not consider these or other requests until after this Court had acted on FERC's petition for certiorari and MMS had established a refund procedure. On April 25, 1984, shortly after the petition for certiorari was denied, MMS published its refund procedures. 49 Fed. Reg. 17,824 (1984). In those procedures, it implied

that Section 10(a) of the OCSLA might bar producers from obtaining refunds of payments made more than two years before the filing of a refund request. *Ibid.* On August 8, 1984, MMS modified its refund procedures. 49 Fed. Reg. 31,779 (1984). It again indicated that payments made more than two years before the filing of a refund request might not be refunded, but stated that the two-year period was tolled by its November 9, 1983 letter declining to consider refund requests until final disposition of the *INGAA* case. *Ibid.* MMS further stated that any refund requests filed before November 9, 1983 tolled the limitations period as of the date they were filed. *Ibid.* On November 23, 1984, MMS denied outright all requests for refunds of royalty payments made before November 9, 1981. App., *infra*, 60a. It excepted claims filed before November 9, 1983, which it acknowledged to have tolled the two-year period as of the date they were filed. *Ibid.*

6. *The Proceedings Below.* Several producers appealed MMS's order to the Department of Interior Board of Land Appeals ("IBLA"), which consolidated the appeals and affirmed the order in relevant part. The IBLA recognized that the time limitation contained in Section 10(a) "was deemed necessary because enterprising lawyers were searching Departmental records to find unrefunded payments and applying for refunds on behalf of those entitled to them, frequently many years after the event which gave rise to a claim." App., *infra*, 43a. Notwithstanding the fact that the producers' claims were not the kind the statute was designed to address, the IBLA held them time-barred, concluding that Section 10(a) unambiguously requires the limitations period to run from the time the royalty payment is made. *Id.* at 44a.

The producers then filed an action in the United States Claims Court to review the decision of the IBLA. Acting upon cross-motions for summary judgment, the Claims Court rejected MMS's interpretation of Section 10(a) and held that the two-year limitations period began to

run no earlier than the date on which the D.C. Circuit invalidated the dry rule.[4] The court reasoned that "the statement [in Section 10(a)] that a refund must be requested 'within two years after the making of the payment' clearly refers to the making of an 'excess' payment." App., *infra*, 17a. Accordingly, the court concluded, "[t]he two year period did not begin to run until a payment became excessive." *Id.* at 18a. And, in the court's view, the payments did not become excessive at least until after the D.C. Circuit invalidated the dry rule and ordered FERC to impose the wet rule retroactively.

The Claims Court expressly rejected MMS's argument that Section 10(a)'s two-year limitations period begins to run at the time royalty payments are made, even if the payments are in the amount required by law when made. It explained:

> Statutes of limitation have the purpose of barring stale claims; they do not serve to preclude claims that have not yet come into existence. [MMS's] position would allow the statute of limitations to run and expire before any cause of action had accrued. Such a result is unreasonable and without judicial support.

App., *infra*, 21a. Moreover, the court observed that the rule advocated by MMS would yield absurd and inefficient results:

> Should * * * the IBLA interpretation [be] allowed to stand, each time a lessee made a royalty payment, it would necessarily have to file an immediate request for refund to protect its interests should the royalty payment later be declared excessive. Many of these requests would, at the time of filing, be unwarranted. This, however, would be the only method to insure

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[4] Because the producers all had filed refund requests within two years of the date of the D.C. Circuit's decision, the court did not need to decide whether the limitations period should run from that date, the date this Court denied the petition for certiorari, or some later date. App., *infra*, 23a n.2.

> the refund of an excess royalty payment. It requires little prescience to see that such a process would lead to an excessive burden for both lessees extracting oil and gas on federal lands and the governmental agencies overseeing those leases and refund request filings. This would be especially true when royalty payments are made on a monthly basis, as here.

App., *infra*, 21a.

The Federal Circuit reversed. It agreed with the Claims Court that "the phrase 'making of the payment' refers to the making of an excess payment." App., *infra*, 6a. However, it rejected the Claims Court's conclusion that the royalty payments at issue became excessive only after the D.C. Circuit invalidated the dry rule. According to the Federal Circuit, "[t]he *INGAA* ruling did not render the royalties excessive, but merely confirmed that fact." *Ibid.* Furthermore, the court reasoned, "[t]he D.C. Circuit's ruling simply does not constitute 'the making of [a] payment.' Therefore, the Claims Court cannot correctly measure the two-year limit from the time of the D.C. Circuit decision." *Ibid.*

The Federal Circuit also disagreed with the Claims Court's conclusion that MMS's reading of Section 10(a) could result in expiration of the limitations period before accrual of the cause of action. The court stated:

> Under the OCSLA, an overpayment gives rise to a claim. The statute does not condition eligibility for a refund on anything other than a request within two years of an excess payment. Therefore, claims for refunds accrue on the date of the payment. The two-year limitation did not expire before it accrued.

App., *infra*, 7a.

The Federal Circuit did acknowledge that Section 10(a)'s two-year limitations period, like the usual statute of limitations, does not "commence[] to run" until the claimants "know or should know of their potential claims." App., *infra*, 7a. The court concluded, however,

that the producers were aware that gas purchasers intended to challenge the dry rule and therefore "knew or should have known that the prices and royalty payments *could* be incorrect." *Ibid.* (emphasis added).

REASONS FOR GRANTING THE PETITION

Petitioners have been whipsawed by two agencies of the same government. They dutifully complied with FERC's methodologies for determining the energy content of gas, charging first purchasers prices based on those methodologies and paying MMS a 12½% share of the amount they received. When FERC adopted the dry rule, petitioners and MMS shared the benefit of the resulting higher gas prices: petitioners received 87½% of the increases and MMS received 12½%. As a result of the D.C. Circuit's decision invalidating the dry rule and ordering FERC to impose the wet rule retroactively, however, petitioners have had to reimburse purchasers *100%* of the differential between dry-rule and wet-rule prices. Meanwhile, MMS has declined to return much of its share of the extra money generated by the dry rule. Thus, MMS has increased its share of the revenue actually generated from outer continental shelf leases well beyond the percentage to which it is entitled under its individual lease agreements. The government plainly has been unjustly enriched.

Ordinarily, windfalls that result from application of statutes of limitations are of no concern to the courts. Statutes of limitations serve a legitimate function of cutting off stale, albeit meritorious, claims; undeserved redistributions of wealth are an accepted by-product of that function. But this case does not involve stale claims. Here, it is undisputed that petitioners had no right to a refund until after the dry rule was struck down and FERC ordered them to reimburse purchasers for the difference between dry-rule and wet-rule prices. Until that time their payments to MMS were exactly what they were required to be: 12½% of the amount they received

from first purchasers for their gas. Had petitioners filed refund claims at the time they made their royalty payments, those claims would have been rejected as unfounded. Nonetheless, the Federal Circuit has interpreted Section 10(a) to require petitioners to have sought refunds within two years of making their royalty payments—*i.e.*, before their refund claims actually ripened.

That ruling deviates from a long and unbroken line of authority holding that statutes of limitations do not begin to run until the claim at issue has accrued. The court of appeals' erroneous decision also is of considerable practical importance. To begin with, it could cost gas producers millions of dollars in refunds to which they unquestionably are entitled, while bestowing upon the government an undeserved windfall of equal amount. Moreover, the court of appeals' decision will directly and adversely influence the administration of the outer continental shelf leasing program. Because FERC orders that affect the maximum lawful price of gas are a routine occurrence and court challenges to such orders are a virtual certainty, the decision below, if allowed to stand, will cause gas producers to flood MMS with protective refund requests. The vast majority of these requests will turn out to be completely unnecessary if the orders to which they relate ultimately are upheld.

The Court should prevent these absurd and burdensome results by reviewing the court of appeals' decision and bringing it into line with the otherwise uniform law on the accrual of statutes of limitations.

I. THE COURT OF APPEALS' INTERPRETATION OF SECTION 10(a) IS INCONSISTENT WITH ESTABLISHED PRINCIPLES GOVERNING THE ACCRUAL OF STATUTES OF LIMITATIONS AND WILL YIELD ABSURD RESULTS

The question of when a statute of limitations begins to run is one of statutory interpretation. Accordingly, the inquiry here must begin with the language of the

statute. See, *e.g.*, *Badaracco* v. *Commissioner of Internal Revenue*, 464 U.S. 386, 392 (1984).

Section 10(a) provides:

> [W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person * * * if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment * * *.

Reading this provision as a whole, both courts below concluded that Section 10(a)'s two-year limitations period begins to run from the making of an excess payment. They reached divergent conclusions about when an excess payment occurs, however.

The Claims Court held that when, as here, some future event that is out of the control of the producer renders an initially proper payment excessive, the excess payment does not occur until the contingency rendering the payment excessive occurs. The Federal Circuit, on the other hand, concluded that *in all circumstances* the excess payment occurs on the date of the royalty payment. That interpretation makes sense for cases in which the payment is excessive from the outset (*e.g.*, when the royalty payor has made an accounting error). However, it reads the term "excess" out of "excess payment" in the category of cases in which a payment is entirely proper when made and becomes excessive only after the occurrence of subsequent events. Accordingly, the Federal Circuit's interpretation is inconsistent with the plain language of the statute.

Indeed, MMS's own conduct undercuts the construction of Section 10(a) that it successfully urged on the Federal Circuit. MMS's regulations provide that "[u]nder *no* circumstances shall the value of production [for royalty purposes] be less than the gross proceeds accruing to the lessee * * *." 30 C.F.R. § 206.150 (1983) (emphasis

added). Had the producers attempted to pay MMS royalties based on wet-rule prices, they would have been in violation of MMS's regulations, which would have subjected them to a variety of sanctions, including substantial fines and cancellation of their leases. See 43 U.S.C. § 1350; 30 C.F.R. § 256.77(b) (1983). MMS thus viewed the payments made under the dry rule as correct payments, not excess payments.

Even if the language of Section 10(a) did not foreclose the court of appeals' decision, that decision deviates sharply from basic principles governing the interpretation of statutes of limitations, ignores the administrative interpretation of Section 10(a)'s predecessor provision that Congress presumptively incorporated when it enacted Section 10(a), and is certain to yield absurd results that Congress could not have intended. Accordingly, further review is warranted.

A. The Court Of Appeals' Decision Is Inconsistent With The Settled Principle That Statutes Of Limitations Do Not Begin To Run Until The Claim At Issue Has Accrued.

1. The law regarding the accrual of claims for statute of limitations purposes is well-settled. As this Court explained a century ago, it is a "general rule that limitation begins to run from the time the plaintiff could sue." *Moline Plow Co.* v. *Webb*, 141 U.S. 616, 623 (1891). Put another way, "[i]t cannot be that the statute of limitations will be allowed to commence to run against a right until that right has accrued in a shape to be effectually enforced." *Borer* v. *Chapman*, 119 U.S. 587, 602 (1887). See also *Woods* v. *Stone*, 333 U.S. 472, 477 (1948) ("[i]t would be unusual, to say the least, if a statutory scheme were to be construed to include a period during which an action could not be commenced as a part of the time within which it would become barred"); *United States* v. *Wurts*, 303 U.S. 414, 418 (1938) ("[i]t would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Con-

gress intended a statute of limitations to begin to run before the right barred by it has accrued"); *Clark v. Iowa City*, 87 U.S. (20 Wall.) 583, 589 (1875) ("[a]ll statutes of limitation begin to run when the right of action is complete").

The Court has applied this rule on numerous occasions analogous to the present case. In *Woods* v. *Stone*, for example, the Court was called upon to determine the triggering event for the statute of limitations governing actions by the federal Price Administrator to recover above-market rent charged by landlords to their tenants in violation of the Emergency Price Control Act of 1942. The statute provided that the Price Administrator could bring suit within one year "from the date of the occurence of the violation." See 333 U.S. at 476 n.4. A landlord argued that the period ran from the making of the rental payments, but the Court held that it did not begin to run until the Price Administrator rendered a determination that the landlord's rents were excessive and the landlord subsequently failed to comply with the Price Administrator's order to refund the overpayments. The Court explained:

> The statute and regulations made [the landlord's] rentals tentative but not unlawful. Until the contingency of readjustment occurred, the tenant could have had no cause of action for recovery of any part of the rental exacted by the landlord. The cause of action now does not rest upon, and hence cannot date from, mere collection. The duty to refund was created and measured by the refund order and was not breached until that order was disobeyed.

Id. at 476-477. See also *Rawlings* v. *Ray*, 312 U.S. 96, 98 (1941) (limitations period for bringing suit to recover unpaid assessment runs from date payment is due, not from date of assessment); *Wurts*, *supra* (limitations period for the government to seek return of erroneously-made tax refunds runs from the date the taxpayer receives the refund, not the date the Commissioner of Internal Revenue authorizes it).

The Seventh Circuit utilized the identical analysis in construing the limitations period for bringing a claim under the Truth in Lending Act against a bank for making an inadequate disclosure as to the computation of interest on credit card debts. The statute provides that plaintiffs must bring their action "within one year from the date of the occurrence of the violation." 15 U.S.C. § 1640(e). Noting that an inadequate disclosure regarding interest rates has no significance until the customer uses the credit card and elects not to pay the bill in full during the "free ride" period, the court held that the violation triggering the limitations period is complete only when the customer first incurs a finance charge, not at the earlier date of the inadequate disclosure. *Goldman* v. *First Nat'l Bank*, 532 F.2d 10, 18-19 (7th Cir.), cert. denied, 429 U.S. 870 (1976).[5]

The Federal Circuit insisted that its interpretation of Section 10(a) was consistent with the rule that statutes

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[5] Applying the same rule, the Third Circuit has held that the triggering date for a securities action stemming from allegedly misleading proxy statements issued in connection with a proposed merger was the date of the merger, not the date of the issuance of the statements. *Baron* v. *Allied Artists Pictures Corp.*, 717 F.2d 105 (3d Cir. 1983). The court explained:

> Had [plaintiff] filed his complaint seeking money damages caused by anticipated use of the proxies in consummation of the merger, that complaint would properly have been dismissed under Fed.R.Civ.P. 12(b)(6) for failure to state a claim upon which money damages could be awarded. Until the plaintiff can allege facts which would survive such a motion, his cause of action for damages * * * has not accrued. Until it has accrued the statute of limitations does not come into operation.

Id. at 109. Similarly, the Second Circuit has rejected the notion that an action under 42 U.S.C. § 1983 alleging that out-of-court statements by a prosecutor deprived the plaintiff of his federal constitutional right to a fair trial accrued at the time of the statements, holding instead that the existence of the action was dependent upon a subsequent event—the outcome of the criminal trial —and that the action accordingly could not accrue until that time. *Martin* v. *Merola*, 532 F.2d 191, 195 n.7 (2d Cir. 1976).

of limitations do not begin to run until "all events necessary to state a claim have occurred." App., *infra*, 6a-7a. It explained:

> Under the OCSLA, an overpayment gives rise to a claim. The statute does not condition eligibility for a refund on anything other than a request within two years of an excess payment. Therefore, claims for refunds accrue on the date of the payment.

Id. at 7a. However, the OCSLA plainly does condition the right to a refund on more than the filing of a request for payment. No refund is permissible unless there has been an *excess* payment, and it cannot be claimed that a payment is excessive until it can be shown that the price ultimately obtained by the producer is less than the price upon which the royalty payment was based. As this case demonstrates, that event is not necessarily contemporaneous with the making of the payment.

Thus, notwithstanding its assertion to the contrary, the Federal Circuit's interpretation of Section 10(a) is squarely inconsistent with the established principle that statutes of limitations do not begin to run until the plaintiff could bring a claim. And it certainly is at odds with the Court's admonition that such interpretations are to be avoided in the absence of language so clear as to leave room for no other reasonable construction * * *." *Wurts*, 303 U.S. at 418. Accordingly, this Court should review the court of appeals' decision to vindicate "the federal interest in uniformity and the interest in having 'firmly defined, easily applied rules' " governing statutes of limitations. *Wilson* v. *Garcia*, 471 U.S. 261, 270 (1985) (quoting *Chardon* v. *Fumero Soto*, 462 U.S. 650, 667 (1983) (Rehnquist, J., dissenting)).

2. In an apparent effort to mitigate the harshness of its interpretation of Section 10(a), the court of appeals acknowledged the established principle that statutes of limitations do not "commence[] to run" until the claimant knows or should know of the injury upon which the claim

is based. App., *infra*, 7a. See, *e.g.*, *United States* v. *Kubrick*, 444 U.S. 111 (1979); *Urie* v. *Thompson*, 337 U.S. 163, 169-170 (1949); see also *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, No. 90-333, slip op. at 12 (June 20, 1991) (terming this rule a "venerable principle" that applies in the "usual case").[6]

The Federal Circuit concluded, however, that this principle (which is commonly known as "the discovery rule") was of no avail to petitioners. It reasoned:

> At the time of the royalty overpayments, [petitioners] were aware that gas purchasers would challenge the new "dry rule." [Petitioners] knew or should have known that the prices and royalty payments *could* be incorrect.

App., *infra*, 7a (emphasis added). The court thus implicitly held that knowledge that an anticipated future event *might* result in harm is enough to trigger the statute of limitations, whether or not the potential harm ever becomes a reality. That is an entirely unprecedented (and unsupportable) reading of the discovery rule's "know" or "should know" requirement.[7]

Indeed, the Seventh Circuit has expressly rejected the very position adopted by the Federal Circuit. In *Webb* v. *Indiana Nat'l Bank*, 931 F.2d 434 (7th Cir. 1991), the plaintiff had brought an action under 42 U.S.C. § 1981

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[6] As the Third Circuit has explained, in the absence of such a rule, courts and administrative agencies would be deluged with "countless" "highly speculative" claims by claimants who are not injured at the time they file their claims, and, indeed, "who might never manifest injury." *Schweitzer* v. *Consolidated Rail Corp. (Conrail)*, 758 F.2d 936, 942 (3d Cir.), cert. denied, 474 U.S. 864 (1985).

[7] Had the court of appeals applied the discovery rule properly, it would have concluded that the producers did not suffer any harm—and thus that Section 10(a)'s limitations period did not begin running—at least until the D.C. Circuit invalidated the dry rule and ordered FERC to impose the wet rule retroactively. At no earlier point could it be said that petitioners "knew or should have known" that the royalty payments were excessive.

alleging that her employer's failures to promote her were racially motivated. The district court dismissed the suit on statute of limitations grounds, holding that the statute began to run not from the dates the plaintiff was passed over, but rather from the earlier point in time when the plaintiff came to believe that her employer harbored hostility to black employees and that this hostility might impede her advancement. The Seventh Circuit reversed, providing "an extreme but illuminating example" (*id.* at 436) of why the theory urged on it was misguided:

> Employee X goes to a fortune teller, who gazes into a crystal ball and sees X standing in line for an unemployment check a year later. X believes in fortune tellers. And, sure enough, a year later he is fired. Did the limitations clock start ticking when his fortune was told? Of course not. *You cannot be forced to sue before you are injured* * * *.

Ibid. (emphasis added). Summarizing the proper rule, the court stated:

> The relevance of knowledge and reason to know is that the time for suit does not begin to run until you know or should know that you have been injured. Which of course presupposes an injury. * * * So, injury plus discovery starts the statute of limitations running * * *.

Ibid. (citation omitted).

The Federal Circuit read the critical requirement of "injury" out of the discovery rule. Unlike the Seventh Circuit, it required petitioners to file a claim as soon as a "fortune teller" predicted that their royalty payments *might* be excessive, even though petitioners had not yet suffered any injury and could not yet prove their claim. The decision below thus plainly conflicts with that of the Seventh Circuit as well as the established body of law that the Seventh Circuit applied. Unless reviewed by this Court, the court of appeals' misapplication of the "know" or "should know" requirement could unsettle what had until now been the uniform law on the accrual of statutes of limitations.

B. The Court Of Appeals Disregarded The Administrative Interpretation Of Section 10(a)'s Predecessor Statute, Which Was Presumptively Incorporated By Congress When It Enacted Section 10(a).

Not only did the court of appeals misapply general statute of limitations principles; it also completely ignored the Comptroller General's long-standing and consistent interpretation of Section 10(a) and its predecessor statute.[8] Section 10(a)'s genealogy dates back to 1919, when Congress enacted a statute governing the sale of federal land that provided in relevant part:

> [I]n all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives: *Provided*, that such person or his legal representatives shall file a request for the repayment of such excess within two years after the patent has issued for the land embraced in such payment * * *.

Act of Dec. 11, 1919, § 2, 41 Stat. 366. Recognizing the need for a refund procedure for overpayments on federal mineral leases (see H.R. Rep. 1949, 71st Cong., 2d Sess. (1930)), Congress subsequently extended the coverage of this provision to "all payments in excess of lawful requirements * * * under any statute relating to the sale, entry, lease, or other disposition of the public lands."

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[8] Congress has vested the Comptroller General with authority to supervise disbursements of funds by federal agencies. See 31 U.S.C. § 712. To enhance the effective performance of this role, Congress expressly authorized the Comptroller General to issue opinions for the guidance of agency officials on matters relating to disbursements of federal funds, including the interpretation of statutes of limitations. 31 U.S.C. § 3529. As this Court has recognized, such opinions by the official charged with overseeing the public fisc and ensuring uniformity in the government's approach to disbursement issues "must be given great weight." *United States* v. *Bergh*, 352 U.S. 40, 46-47 (1956).

Act of June 27, 1930, 46 Stat. 822. Because Congress did not change the language of the 1919 law in any way to reflect the statute's broader coverage, the Secretary of the Interior sought guidance from the Comptroller General as to when the limitations period should be considered to begin running in cases involving periodic lease payments, rather than the issuance of a single patent. The Comptroller General began his opinion by reiterating the well-established rule governing the accrual of statutes of limitations:

> It is a general rule of statutory construction that a statute of limitation begins to run from the time the right of action which it covers accrues; and that when such right depends upon the happening of an event or contingency, the statute does not begin to run until the happening of such event or contingency.

20 Comp Gen. 734, 738 (1941).[9] He then drew a crucial distinction between two categories of overpayments: (1) excess payments made because of an error on the part of either the lessor or the lessee, and (2) "cases in which the payment when made was as required by law but by reason of some subsequent contingency it became in excess of that required by law." *Id.* at 738-739. He concluded that different accrual dates were appropriate for these very different kinds of cases:

> As to the first class, since no subsequent action or contingency is required to give rise to the right to a refund—such right arising immediately when payment is made—the 2-year period of limitation begins to run from the date the excess amount is paid. With respect to the second class, since the right to refund does not arise until the happening of whatever contingency may be involved, the 2-year period

[9] The Comptroller General has repeated this formulation of the general rule on several occasions. See, *e.g.*, 62 Comp. Gen. 227, 228 (1983); 82-2 Comp. Gen. Proc. Dec. ¶ 408, at 3 (1982); 1982 U.S. Comp. Gen. LEXIS 740, at 8-9 (July 7, 1982).

> of limitation would begin to run from the date of such happening.

Id. at 739.

In 1953, Congress enacted the OCSLA and incorporated the refund provision of the 1919 statute in almost its exact wording. See *Hearings on S. 1901 Before the Senate Committee on Interior and Insular Affairs*, 83d Cong., 1st Sess. 638 (1953) (Department of the Interior's testimony that Section 10(a) "was taken" from the 1919 law). Because the OCSLA dealt exclusively with leases, Congress changed the triggering date for the limitations period from the date of issuance of a land patent to the date of an excessive royalty payment. As the IBLA concluded, however, "a review of the legislative history does not disclose that the change was intended to do more than substitute a term appropriate to mineral leasing." App., *infra*, 43a. Indeed, the representative of the Department of the Interior testified at the Senate hearing on the OCSLA that "[t]here [was] no change of substance" between the 1919 limitations provision and Section 10(a). *Hearings on S. 1901*, at 638.

Because Congress did not intend a substantive change, it is deemed to have incorporated in Section 10(a) the Comptroller General's opinion interpreting the 1919 provision. See, *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"). See also *Green* v. *Bock Laundry Machine Co.*, 490 U.S. 504, 521 (1989) ("[a] party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change").[10]

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[10] Congress also is presumed to have grafted on to Section 10(a) the basic principles on the accrual of statutes of limitations that had been firmly established for so many years prior to enactment of that provision. As this Court recently explained:

Accordingly, the Comptroller General has given Section 10(a) precisely the same construction as the 1919 provision. For example, in response to a request from the Chairman of the Senate Committee on Interior and Insular Affairs for an opinion, the Comptroller General concluded that Section 10(a)'s two-year limitations period does not begin to run until "the date upon which it could first be determined that excess royalty payments had, in fact, been made." Letter from Comptroller General Elmer B. Staats to Senator Henry M. Jackson (July 8, 1974) (C.A. App. 312, 314).

The facts of the specific case upon which the Comptroller General was opining are analogous to the facts of the present case. There, a producer sought to enter into a unitization agreement with the Department of Interior and the State of Louisiana.[11] Under the agreement, the production attributed to the producer's federal leases was to be reduced retroactively, while the production attributable to the state leases was to be increased retroactively. C.A. App. 313. As a result, the royalty payments that had been made to the Department of Interior would become overpayments, and the royalty payments that had been made to Louisiana would become underpayments. The producer did not file a request for refunds of the potential overpayments until after the Department approved the agreement. By that time, more than two years

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> Congress is understood to legislate against a background of common-law adjudicatory principles. Thus, where a common-law principle is well established * * *, the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.

Astoria Fed. Savings & Loan Ass'n v. *Solimino*, No. 89-1895, slip op. at 3 (June 10, 1991) (citations and internal quotation marks omitted).

[11] Unitization agreements permit multiple leases encompassing a single productive geological formation to be joined together into a single unit so that production from any particular lease in the unit can be attributed to the other leases in the unit.

had elapsed since many of the affected royalty payments were made. Nonetheless, the Comptroller General concluded that the producer's refund claim was not time-barred because it was filed "within two years of the date the Unit Agreement was approved, and it was only at this time that the amount or, for that matter, even the existence of an overpayment became known." *Id.* at 314.[12]

Here, just as in the unit agreement context, the existence (and amount) of an overpayment could not be known at the time the original royalty payments were made. At least until the D.C. Circuit invalidated the dry rule and ordered FERC to impose the wet rule retroactively, the royalties paid to MMS were not in excess of what the producers were lawfully required to pay. MMS was entitled to 12½% of the amount received by the producers, and that is exactly what the producers paid it. It was only after the reimbursements reduced the amount received by the producers for their gas that the

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[12] The Department of the Interior had reached the same conclusion, reasoning:

> At the time the payments were received, they were not in excess of what the lessee was lawfully required to pay. Until such time as the proposed unit agreement is approved by all the necessary parties, there will exist no excess payment which will be subject to reimbursement by refund or credit. It would be unreasonable to require a lessee to file a request for repayment within two years of date of payment when at that time neither the amount nor even the existence of an overpayment could be determined. Strictly speaking, the overpayment will only come into existence upon approval of the unit agreement, and it is the date when the overpayment comes into existence from which the statute of limitations is measured rather than the date on which the lessee paid certain money which only subsequently became an overpayment.

Memorandum from Frederick N. Ferguson, Assistant Solicitor—Minerals Division of Public Lands to Director, Geological Survey (Oct. 12, 1972) (C.A. App. 318, 319). About a decade later, the Solicitor of Interior abandoned the reasoning employed in the 1972 memorandum. See *Refunds and Credits Under the Outer Continental Shelf Lands Act*, 88 I.D. 1090, 1101-1102 (1981).

payments to MMS became in excess of the amount to which it was lawfully entitled. The court of appeals' conclusion that Section 10(a)'s limitations period began to run before petitioners had a right to a refund thus squarely conflicts with the Comptroller General's consistent and long-standing interpretation of Section 10(a).

C. The Court of Appeals' Decision Will Yield Absurd Results.

It is an elementary rule of statutory construction that courts should refrain from interpreting statutes in a way that will generate absurd results. See, *e.g.*, *Sheridan* v. *United States*, 487 U.S. 392, 402 n.7 (1988); *United States* v. *Kirby*, 74 U.S. (7 Wall.) 482, 486 (1869); *Green*, 490 U.S. at 527 (Scalia, J., concurring). The court of appeals' interpretation of Section 10(a) transgresses this principle. Under the court's approach—which deems the limitations period to begin running from the time of payment, so long as the producer has reason to know that some anticipated future event *could* result in a retroactive change in gas prices—producers will have to file claims before they have any right to a refund. As this Court has emphasized, that is an "unusual" way to interpret a statute of limitations, "to say the least." *Woods*, 333 U.S. at 477. See also *Baron*, 717 F.2d at 109.

This bizarre result is not a mere theoretical possibility. FERC orders that affect gas prices are common, and those orders virtually always come under challenge. As a consequence, producers cannot know with certainty whether the gas prices they charge today will be retroactively changed at some time in the future.

A case that is being held in abeyance by the Claims Court pending resolution of the present one vividly illustrates the problem. That case involves an FPC order issued in July 1971 that retroactively lowered the price of gas for the period between January 1962 and December 1970. That same order authorized producers to defer making refunds to their customers until October 1977.

After producers began making the required refunds, the royalty payments that they had made to MMS no longer reflected the price they had received for their gas. Accordingly, from 1976 through 1982, the various affected producers filed claims for refunds. In May 1985, MMS denied the refunds on the ground that the claims were not filed within two years of the payments. The IBLA affirmed MMS's conclusion that the limitations period ran from the date of payment. 96 I.B.L.A. 384 (1987).

Arguably, the producers affected by the FPC's retroactive order should have known that such an order was possible when they made their royalty payments from 1962 through 1970: the FPC had been *considering* changes in gas prices for virtually all of the relevant period. Thus, under the court of appeals' reasoning, the producers should have filed protective refund claims with their royalty payments or shortly thereafter. But if protective filings would be necessary in the case of payments made nine years before a retroactive change in gas prices and 15 years before retroactive reimbursements are made to gas purchasers, in what circumstance would a protective filing not be required? No prudent producer would be foolhardy enough to refrain from filing a protective refund request in the hope that the IBLA or a court will conclude that it neither knew nor should have known of the circumstances that *might* result in its right to a refund. Instead, to ensure that the statute of limitations does not bar potential refund claims, prudent producers will file a protective refund request with every royalty payment.

Because producers make monthly royalty payments on a total of approximately 6,500 federal offshore oil and gas leases (see U.S. Dep't of Interior, *Federal Offshore Statistics: 1989*, at 24), MMS can expect to receive tens of thousands of protective filings each year. And, because FERC orders affecting gas prices are subject to deferential review, see 15 U.S.C. § 3416(b); 5 U.S.C. § 706, the substantial majority of these protective filings will turn

out to have been wholly unnecessary. As the Claims Court observed, "[i]t requires little prescience to see that such a process would lead to an excessive burden for both lessees extracting oil and gas on federal lands and the governmental agencies overseeing those leases and refund request filings." App., *infra*, 21a.

That added burden is particularly unwarranted when, as here, protective filings will serve no useful purpose. MMS has as much, if not more, actual knowledge of FERC orders and court challenges that could affect gas prices as even the largest and most legally sophisticated of the more than 100 federal offshore lease holders. See *Federal Offshore Statistics* 96. Receiving a flurry of speculative protective filings will not increase its awareness of circumstances that might necessitate refunds and hence will not enhance its ability to budget for such refunds in any way.

Moreover, it is by no means clear that protective filings will even "protect" gas producers. At present, MMS is free to deny a protective filing on the ground that the producer has not shown that the royalty payment exceeds the amount lawfully required. Unless a claimant could keep an appeal of such a denial alive until the anticipated contingency occurs, the denial could become final and the claim forever barred *before* it ever ripens. The court of appeals' decision thus confronts producers with a classic Catch-22: either file protective claims and risk having those claims denied as unfounded or refrain from filing and risk having the claims deemed time-barred.

For similar reasons, this Court has expressly rejected an earlier effort by the government to use the possibility of protective filings to justify construing a statute of limitations to begin running before the plaintiff had a right to bring a claim. In casting aside the government's assertion that the statute of limitations for government contract disputes begins to run before the statutorily-mandated review process has been completed, the Court stated:

> [T]he contractor is not legally entitled to ask the courts to adjudicate his claim as an original matter. Nor can he sensibly ask the courts to review a decision which has not yet been made. He cannot, with honesty, make the necessary allegations to support an action for review until the administrative process is completed and the agency decision known. Since it would remain quiescent until the administrative decision is rendered, the protective suit would be a sheer formality in any event—a procedural trap for the unwary and an additional complication for those who manage the dockets of the courts.

Crown Coat Front Co. v. *United States*, 386 U.S. 503, 515 (1967).

Here, as in *Crown Coat*, the protective claims touted by the government and the Federal Circuit will be no more than a "sheer formality" that will have no redeeming value. Because the court of appeals' interpretation of Section 10(a) "attribute[s] to Congress the intention to * * * open the door to such obvious incongruities and undesirable possibilities," *Metropolitan Edison Co.* v. *People Against Nuclear Energy*, 460 U.S. 766, 776 (1983), that interpretation warrants review by this Court.

II. THE OUTCOME OF THIS CASE IS OF CONSIDERABLE LEGAL AND PRACTICAL SIGNIFICANCE

Although the Federal Circuit's divergence from established principles is reason enough to review the decision below, there are several additional reasons why review is imperative. To begin with, cases involving refunds under Section 10(a) can arise *only* in the Federal Circuit. Thus, unless reviewed by this Court, the decision below will control *every* Section 10(a) refund claim nationwide. Similarly, the Federal Circuit exercises exclusive jurisdiction over numerous other kinds of claims against the United States. Accordingly, the idiosyncratic principles announced in the decision below could skew the nationwide interpretation of a range of other statutes of limitations.

In addition, the Federal Circuit's decision will have severe practical consequences. In this case alone, producers stand to lose approximately $6.5 million in refunds as a result of the rule adopted by the court of appeals. See Entry of Judgment, *Chevron U.S.A. Inc.* v. *United States*, No. 350-87 L, *et al.* (Cl. Ct. Dec. 5, 1989) (App., *infra*, 25a). The court's ruling also is likely to determine rights to refunds of substantial other royalty overpayments resulting from the *INGAA* decision that were not part of this litigation. And it may well be dispositive of pending claims for approximately $1.5 million in overpayments resulting from the 1971 FPC order that retroactively lowered the price of gas produced between January 1962 and December 1970. See pages 25-26, *supra*. In short, the court of appeals' decision could unfairly cost producers close to $10 million in lost refunds.

Moreover, the decision is certain to have ramifications for administration of the entire outer continental shelf leasing program. Producers pay more than $2.1 billion per year in royalties on oil and gas extracted from the outer continental shelf. *Federal Offshore Statistics* 49. All of those payments are subject to the court of appeals' harsh and unworkable rule. Because refund claims are reviewable only in the Federal Circuit, producers now will be forced to file thousands of protective claims each year to preserve their right to refunds in the event some future occurrence makes refunds appropriate. MMS will be forced to divert valuable resources to handle these numerous filings, even though those filings will provide no discernible benefit to MMS. Because it is the judicial function "to make sense rather than nonsense out of the *corpus juris*" (*West Virginia Univ. Hosps., Inc.* v. *Casey*, 111 S. Ct. 1138, 1148 (1991)), this Court should grant review and reverse the decision of the court below.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

90-5053

CHEVRON U.S.A., INC., PENNZOIL CO., POGO PRODUCING CO., PHILLIPS PETROLEUM CO., SHELL OFFSHORE, INC., MOBIL OIL CORP., MOBIL OIL EXPLORATION & PRODUCING TEXAS & NEW MEXICO, INC., MOBIL EXPLORATION & PRODUCING NORTH AMERICA INC., EXXON COMPANY, U.S.A., a division of EXXON CORPORATION, AMOCO PRODUCTION COMPANY and COLUMBIA GAS DEVELOPMENT CORPORATION, CONOCO, INC., PLAINTIFFS-APPELLEES,

v.

THE UNITED STATES, DEFENDANT-APPELLANT.

Decided: January 16, 1991

Before NIES, *Chief Judge*, LOURIE and RADER, *Circuit Judges*. RADER, *Circuit Judge*.

The United States appeals from the judgment of the United States Claims Court, *Chevron U.S.A., Inc. v. United States*, 17 Cl. Ct. 537 (1985), granting the claims of appellee natural gas producers for refunds of excessive royalties paid on Government leases. The Government asserts that the Claims Court erroneously overturned the final decision of the Department of Interior Board of Land Appeals holding that all of the asserted requests for refunds were un-

timely under the Outer Continental Shelf Lands Act (43 U.S.C. §§ 1331-1356 (1982) (OCSLA)). This court reverses and remands.

BACKGROUND

Plaintiffs-appellees are natural gas producers who leased submerged lands on the Outer Continental Shelf. The Minerals Management Service (MMS) of the Department of the Interior leases these lands for offshore oil and gas development. MMS collects royalties on each lease.

In 1978, the Natural Gas Policy Act (NGPA) set maximum prices for natural gas. 15 U.S.C. § 3301-3432 (1982). Under the NGPA, the Federal Energy Regulatory Commission (FERC) enforces those ceiling prices. MMS linked lease royalties to the ceiling prices. A change in the prices thus changed the royalty.

Before the NGPA, the "wet rule" governed gas measurements and pricing. The "wet rule" assumed that water vapor in the natural gas reduced its energy content. FERC Order No. 93 changed the gas measurement standard to the "dry rule." This new rule measured the energy content of gas without reference to water vapor content. Order No. 93, F.E.R.C. Stats. & Regs. [Regs. Preambles, 1977-81] (CCH) ¶ 30,172 (July 16, 1980); Order No. 93-A, 15 F.E.R.C. (CCH) ¶ 61,075 (April 24, 1981). The ceiling price under the "dry rule" exceeded the "wet rule" ceiling. Appellees therefore paid higher royalties when the "dry rule" was in effect.

Several gas purchasers sought judicial review of FERC's order. In 1983, the United States Court of Appeals for the District of Columbia Circuit vacated

FERC's order. *Interstate Natural Gas Ass'n of Am. v. F.E.R.C.*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984) (*INGAA*). The D.C. Circuit determined that FERC lacked authority to abandon the "wet rule." Furthermore, the court ordered FERC to reinstate the "wet rule." This order retroactively reduced prices. Due to the reduction in prices, the lease royalties also fell. Therefore, for the period from late 1978 through 1984 (when the D.C. Circuit's order became final), lessees had overpaid royalties.

FERC ordered gas producers to refund to gas pipeline and distribution companies the difference between "wet rule" and "dry rule" prices. The producers then sought reimbursement from MMS for excess royalty payments. The producers in the case at bar filed a refund application within two years of the D.C. Circuit's decision, but not within two years of the payment of royalties to MMS.

MMS denied all requests for refunds of payments made prior to November 9, 1981 and filed after November 9, 1983 on the ground of untimeliness under § 1339(a) of the OCSLA. Refund Procedures and Order to Pay Royalties, 49 Fed. Reg. 31779, Aug. 8, 1984 (Refund Procedures). Section 1339(a) requires gas producers to file for refunds "within two years after the making of the payment." 43 U.S.C. § 1339(a). MMS, however, made an exception for those leasees who filed "proper notice with MMS which tolled the 2-year statute." Final Order, on Royalty Refund Requests Resulting from FERC Orders 93/93A, 49 Fed. Reg. 47120, Nov. 30, 1984 (Final Order).

The Department of Interior Board of Land Appeals (IBLA) affirmed MMS's decision. The IBLA held that

§ 1339(a) gives a lessee two years from the payment of royalties to apply for a refund. *Shell Offshore, Inc.*, 96 IBLA 149, 165 (1987). The Claims Court ruled that OCSLA's two-year limitation on refund applications did not begin to run until the D.C. Circuit vacated FERC's "dry rule" order. The Government appeals from the decision of the Claims Court.

DECISION

This court must determine whether the Claims Court correctly interpreted 43 U.S.C. § 1339(a). Specifically, this court must determine when the two-year limitation on refund requests begins to run.

The lessees brought their action in the Claims Court under the Tucker Act, 28 U.S.C. § 1451 (Supp. 1990). The Tucker Act grants the Claims Court jurisdiction over monetary claims founded on acts of Congress. The Claims Court appropriately took jurisdiction of the refund claim based on the OCSLA. This court reviews *de novo* the legal conclusions of the Claims Court. *Cooper v. United States*, 827 F.2d 762, 763 (Fed. Cir. 1987); *Milmark Servs., Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir. 1984); *Heisig v. United States*, 719 F.2d 1153, 1158 (Fed. Cir. 1983).

43 U.S.C. § 1339(a) states:

> [W]hen it appears to the satisfaction of the Secretary [of Interior] that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, *if a request for repayment of such excess is filed with*

> *the Secretary within two years after the making of the payment . . . .*

(Emphasis added.) This language requires lessees to request the refund of any excess payment "within two years after the making of the payment."

To qualify for a refund, a lessee must make a timely request. The phrase "within two years after the making of the payment" defines the timeliness of a refund request. By its terms, this phrase requires a request within two years from the time a lessee makes its original royalty payment.

The context of this phrase underscores its clear meaning. The statute does not use the phrase "making of the payment" solely to condition a refund upon a timely request. Rather, the phrase—in a slightly different grammatical form—also appears in an introductory clause: "when it appears . . . that any person has *made a payment* to the United States in connection with any lease under this subchapter . . . ." 43 U.S.C. § 1339(a) (emphasis added). Thus, the "payment" phrase defining timely requests refers to the original excessive royalty payment. This context further links the refund request to the original royalty payment.

In the case at bar, appellees first requested a refund more than two years after making excessive payments. Therefore, the statute barred any refund. The statute did not authorize the Secretary of Interior (Secretary) to pay, nor appellees to receive, any refund requested past the two-year limit.

The statute does not state that a lessee must request a refund "within two years after discovery that a payment was excessive." Nor does the statute

state that a lessee must request a refund "within two years after a judicial determination rendering a payment excessive." The statute requires a request "within two years after the making of the payment." By interpreting the OCSLA otherwise, the Claims Court erred.

The Claims Court determined that the phrase "making of the payment" refers to the making of an excess payment. *Chevron*, 17 Cl. Ct. at 541. On this point, the Claims Court interpretation is correct. The Claims Court also reasoned that the payments "became excessive" when the D.C. Circuit invalidated the FERC rule. *Id.* at 543. On this point, the Claims Court strayed from the statute. The *INGAA* ruling did not render the royalties excessive, but merely confirmed that fact. *Cf. Baranfeld v. United States*, 442 F.2d 371 (Ct. Cl. 1971). In any event, the Claims Court erred by measuring the two-year limitation from the issuance of the *INGAA* ruling. The D.C. Circuit's ruling simply does not constitute "the making of [a] payment." Therefore, the Claims Court cannot correctly measure the two-year limit from the time of the D.C. Circuit decision.

The Claims Court also reasoned erroneously that enforcing the language of § 1339(a) would cause the "statute of limitations to run and expire before any cause of action had accrued." * *Chevron*, 17 Cl. Ct. at 542. Under federal law governing statutes of limitations, a cause of action accrues when all events nec-

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* Technically speaking, § 1339(a) is not a "statute of limitations." The phrase "statute of limitations" conventionally refers to temporal limits on a judicial, rather than an administrative, claim. *American Tel. & Tel. Co. v. United States*, 685 F.2d 1361, 1364 n.7 (Fed. Cir. 1982).

essary to state a claim have occurred. *Kinsey v. United States*, 552 F.2d 556, 557 (Fed. Cir. 1988) (quoting *Oceanic S.S. Co. v. United States*, 165 Cl. Ct. 217, 225 (1964)). Under the OCSLA, an overpayment gives rise to a claim. The statute does not condition eligibility for a refund on anything other than a request within two years of an excess payment. Therefore, claims for refunds accrue on the date of the payment. The two-year limitation did not expire before it accrued.

Appellees argue nonetheless that they were ignorant of the claim accrual until after the *INGAA* decision. Ignorance of claim accrual does not automatically toll the running of a statute of limitations. *Dincher v. Marlin Firearms Co.*, 198 F.2d 821, 826 (2d Cir. 1952) (quoting *Kennedy v. Johns-Manville Sales Corp.*, 62 A.2d 771, 773 (Conn. 1945)). Rather, the statute commences to run when claimants know or should know of their potential claims. *Townley v. Norfolk & W. Ry. Co.*, 887 F.2d 498, 501 (4th Cir. 1989). At the time of the royalty overpayments, appellees were aware that gas purchasers would challenge the new "dry rule." Appellees knew or should have known that the prices and royalty payments could be incorrect. The event giving rise to appellees' refund claim was payment of the initial royalty. Again, the two-year limitation did not expire before it accrued.

Appellees had a procedural recourse to prevent expiration of the two-year time limit during pendency of the D.C. Circuit litigation. On December 15, 1981, the Department of Interior Solicitor (Solicitor) set forth the required procedures for requesting a refund. Refunds and Credits Under the Outer Continental Shelf Lands Act, 88 I.D. 1090 (1981)

(*Credits*). To claim a refund, lessees had to file a written request, stating the specific amount sought and the reason why the amount levied was excessive. *Credits* at 1099. MMS, citing the Solicitor's opinion, promulgated procedures permitting producers to toll the two-year limitation by giving notice to the Secretary of an intent to seek a refund. Final Order, at 47120; Refund Procedures, at 31779. Thus, gas producers had a means to protect their potential refund claims under the statute. The United States Court of Appeals for the Fifth Circuit and the FERC independently determined that the producers could have satisfied § 1339(a)'s two-year bar by simply notifying MMS. *See Shell Offshore, Inc. v. F.E.R.C.*, 858 F.2d 1147, 1153 (5th Cir. 1988), *reh'g denied* (1989).

This court has held:

> [I]n matters of statutory interpretation, the construction adopted by an agency charged with the duty to administer the statute . . . is usually given deference.

Beneficial Corp. & Subsidiaries v. United States, 814 F.2d 1570, 1574 (Fed. Cir. 1987). This court has further held that the agency's decision should receive no deference if it is unreasonable or "contravenes clearly discernible legislative intent." *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986). The IBLA's opinion was well-reasoned and did not violate the intent of Congress.

The statute does not support the Claims Court's decision. Accordingly, we remand this case to the Claims Court with instructions to dismiss, unless the Claims Court determines that appellees met the notice requirements.

REVERSED AND REMANDED

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

90-5053

CHEVRON U.S.A., INC., PENNZOIL CO., POGO PRODUCING CO., PHILLIPS PETROLEUM CO., SHELL OFFSHORE, INC., MOBIL OIL CORP., MOBIL OIL EXPLORATION & PRODUCING TEXAS & NEW MEXICO, INC., MOBIL EXPLORATION & PRODUCING NORTH AMERICA INC., EXXON COMPANY, U.S.A., a division of EXXON CORPORATION, AMOCO PRODUCTION COMPANY and COLUMBIA GAS DEVELOPMENT CORPORATION, CONOCO, INC., PLAINTIFFS-APPELLEES,

v.

THE UNITED STATES, DEFENDANT-APPELLANT.

ORDER

Before NIES, Chief Judge, LOURIE, Circuit Judge, and RADER, Circuit Judge.

A petition for rehearing having been filed in this case, and a response thereto having been invited by the court and filed,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

The mandate will issue on April 11, 1991.

FOR THE COURT

/s/ Francis X. Gindhart
FRANCIS X. GINDHART
Clerk

Dated: April 4, 1991

APPENDIX C

IN THE UNITED STATES CLAIMS COURT

Nos. 350-87L
352-87L
353-87L
384-87L
391-87L
409-87L
554-87L
679-87L

(Filed: July 24, 1989)

CHEVRON U.S.A., INC., ET AL., PLAINTIFFS

v.

THE UNITED STATES, DEFENDANT

Statutory Interpretation; APA Review Of Final Agency Decision; Issues of Law v. Fact; No Deference To Agency; Statute Of Limitations; Refund Of Excess Oil And Gas Royalty Payments By Defendant.

Thomas J. Eastment, Washington, D.C.; *M. Taylor Darden*, New Orleans, Louisiana; *J. Berry St. John, Jr.*, New Orleans, Louisiana; *Ernest J. Altgelt, III*, Houston, Texas; *David A. Waskowiak*, New Orleans, Louisiana, for plaintiffs.

Margaret M. Sweeney, Washington, D.C., for defendant.

ORDER

TIDWELL, *Judge*:

This consolidated action is before the court on parties' cross-motions for summary judgment. Plaintiffs, separate oil companies, sought a refund of excess royalties paid to the United States on the sale of natural gas extracted from federal lands on the outer continental shelf (OCS), pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356 (1982). The pivotal issue in this case is which of two contradictory interpretations of 43 U.S.C. § 1339(a) (1982) applies to plaintiffs cause of action. The statute allows the refund of excess royalty payments if the payor makes a timely refund request to the Secretary of Interior. In a final decision of the Department of Interior Board of Land Appeals (IBLA), defendant refused to refund plaintiffs' royalties based upon plaintiffs' alleged failure to make a timely request. The court is asked to review that finding, to interpret 43 U.S.C. § 1339, and to determine when the two year period for making a timely refund request began to run.

FACTS

Plaintiffs are oil and gas companies holding leases on federal land located on the OCS. Under the OCSLA, the Mineral Management Service (MMS) has the responsibility of collecting royalties from lessees of OCS lands based on the amount of oil and gas extracted. The Federal Energy Regulatory Commission (FERC) administers the price setting procedures for the eventual sale of the oil and gas. Through November 1978, plaintiffs paid royalties to defendant

on monies received from the sale of gas extracted from their OCS leases based on a calculation known as the "wet rule." Under the "wet rule," the maximum prices for natural gas were set according to energy measurements in British thermal units (Btu) based on the assumption that the gas was saturated with water. The energy content reflected by saturated gas was lower than the actual energy content, resulting in a lower selling price per unit than would be otherwise.

On July 16, 1980 and April 24, 1981, FERC issued Orders No. 93 and 93-A, respectively, instituting what was known as the "dry rule." Under this rule, FERC required that maximum prices for natural gas be set according to Btu measurements based on the actual energy content of the gas delivered to purchasers. Unlike the "wet rule," the "dry rule" reflected the energy content of unsaturated gas, which resulted in a measurably higher energy content per unit. Consequently, the maximum sales price for natural gas increased. FERC also required the retroactive application of the "dry rule" to December 1, 1978. Purchasers of plaintiffs' natural gas were thus required to pay higher gas prices and to make retroactive payments to plaintiffs. Plaintiffs, in turn, were required to make retroactive royalty payments to MMS on the additional monies received.

Purchasers of plaintiffs' natural gas challenged Orders No. 93 and No. 93-A in the United States Court of Appeals for the District of Columbia on June 19, 1981. On Aug. 9, 1983, the D.C. Circuit vacated the FERC Orders and ordered reinstatement of the "wet rule." *Interstate Natural Gas Assoc. v. FERC*, 716 F.2d 1 (D.C. Cir. 1983), *cert. denied sub nom., Exxon Corp. v. Interstate Natural Gas Assoc.*,

465 U.S. 109 (1984) [hereinafter *INGAA*]. The Supreme Court denied certiorari on March 19, 1984. Based on the *INGAA* decision, FERC promulgated interim regulations and Final Orders (Nos. 399, 399-A, 399-B) requiring the recalculation of natural gas prices using the "wet rule" retroactive to December 1, 1978. The regulations also required plaintiffs to refund the excess payments made by purchasers under the "dry rule." Plaintiffs returned the monies to the purchasers, then requested refunds from defendant on the excess royalties paid by plaintiffs. On November 30, 1984, the MMS denied plaintiffs' refund requests based on its reading of 43 U.S.C. § 1339(a). Upon denial of their requests for refund, plaintiffs appealed the MMS decision to the IBLA. The IBLA issued its final decision on March 17, 1987, affirming the MMS interpretation of 43 U.S.C. § 1339(a). Plaintiffs then filed a claim in this court seeking review of the IBLA decision. Defendant responded with a motion for summary judgment, to which plaintiffs cross-moved on the specific issue of liability.

DISCUSSION

Summary judgment is appropriate when there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. RUSCC 56(c). A genuine issue of material fact is present if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material if it could affect the outcome of the suit, and its materiality is determined by the substantive law applicable to the case. *Id.* The court finds, and the parties agree, that there are no material facts in dispute and that this case is ripe for disposition by way of summary judgment.

The character of this case is one of a review of a final agency decision. The court notes that its jurisdiction in this case is proper and that plaintiffs have exhausted their administrative remedies. In reviewing the IBLA decision, the court may "set aside agency decisions found to be illegal because they are arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, not in substantial compliance with procedural requirements, or otherwise contrary to law." *Foote Mineral Co. v. United States*, 228 Ct. Cl. 230, 234, 654 F.2d 81, 85 (1981). The court need not agree with the agency's decision, but must determine whether the decision was based on relevant factors, whether the decision lacked a rational basis, or whether the decision represented a clear error of judgment. *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 285 (1974); *Rogers v. United States*, 14 Cl. Ct. 39, 46 (1987).

In dispute is the proper interpretation of 43 U.S.C. § 1339, which gives the Secretary of Interior authority to refund excessive payments made to the United States under OCS leases. A refund is required if the OCS lessee "files a request for repayment of such excess . . . within two years after the making of the payment . . . ." 43 U.S.C. § 1339(a). Plaintiffs read this language as constituting a two year statute of limitations which would begin to run only after a refund payment became excessive. Plaintiffs argued that they made royalty payments as required by law under the "dry rule," and that it was not until the "dry rule," and that it was not until the "dry rule" was vacated by the D.C. Circuit and certiorari denied by the Supreme Court that their refund payments became excessive. Defendant, on the other

hand, did not characterize section 1339 as a statute of limitations, but simply argued that plaintiffs had two years from the original payment of royalties to file for a refund, based upon the "clear wording" of the statute.[1] Since plaintiffs failed to file requests for repayment within the requisite two year period from the dates they made actual payments to MMS, defendant argued, plaintiffs were barred from asserting any right to a refund.

It is academic that statutes are to be construed to give effect to the statutory language of the whole. The Supreme Court has repeatedly observed that it is an "elementary canon of construction that a statute should be interpreted so as not to render one part inoperative." *Mountain States Tel. & Tel. Co. v. Santa Ana*, 472 U.S. 237, 249 (1985). The parties dispute the interpretation of the phrase, "such excess shall be repaid . . . if a request for repayment . . . is filed within two years after the making of the payment . . . ." 43 U.S.C. § 1339. When read by itself, out of context, the language would appear to support defendant's interpretation. The court, however, must look to the entire statute to give proper meaning to the phrase. 43 U.S.C. § 1339 states:

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[1] Defendant argued that the "payments" language should be characterized as a right to a refund or a right to proceed with a cause of action, not a statute of limitations, thus warranting deference to the agency's interpretation of the statute. The court sees no difference between a right to a refund and a statute of limitations. Indeed, defendant conceded this point in its briefs, but re-opened the issue at oral argument. The court in *Shell Offshore, Inc. v. FERC*, 858 F.2d 1147 (5th Cir. 1988), a case upon which defendant placed great weight, specifically found that section 1339 was a statute of limitations, contrary to defendant's assertion. *Id* at 1151. The court concurs, and treats section 1339 accordingly.

> (a) Subject to the provisions of subsection (b) of this section, when it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment . . . . The Secretary shall certify the amounts of all such repayments to the Secretary of the Treasury, who is authorized and directed to make such repayments out of any moneys in the special account established under section 1338 of this title and to issue his warrant in settlement thereof.
>
> (b) No refund or credit for such excess payment shall be made until after the expiration of thirty days from the date upon which a report giving the name of the person to whom the refund or credit is to be made, the amount of such refund or credit, and a summary of the facts upon which the determination of the Secretary was made is submitted to the President of the Senate and the Speaker of the House of Representatives for the transmittal to the appropriate legislative committee of each body respectively . . . .

When read as the conclusion of a sentence which refers three times to "excess" payments, the statement that a refund must be requested "within two years after the making of the payment" clearly refers to the making of an "excess" payment. Every mention of "payment" in the statute is made in ref-

erence to "excess payment." No disjunctive exists which would serve to suggest that Congress intended to attach an alternate, opposite or contrasting meaning to its use of the word "payment." In addition, subsection (b) begins with the phrase, "[n]o refund or credit for such excess payment shall be made . . ." with further references to reports of such refunds to be made to Congress. It is apparent that the single mention of the word "payment" in subsection (a) refers to an "excessive payment." When interpreting statutes, the court is "obligated to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979) (citing *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)). Viewing section 1339 as a whole, the court thus finds that the two year period in which to file a refund request began to run when the lessee made an excess payment. Such a construction gives effect to the entire statute and preserves the substance of the language embedded in its overall form.

It is without question that the court's construction of section 1339 stands in direct conflict with the IBLA interpretation. The IBLA asserted that "[t]here is no ambiguity in the wording of the statute; the terms of the Act [43 U.S.C. § 1339] cannot be varied simply because the appellants [plaintiffs] may for other reasons appear to deserve refunds." *Shell Offshore, Inc.*, 96 I.B.L.A. 149, 165 (1987). The court agrees; the statute is not ambiguous and the terms may not be varied to accommodate the needs of a party. The court does not seek to change the terms of section 1339, it seeks only to interpret the section in the manner Congress reasonably intended. The two year period did not begin to run until a payment became excessive. This reading is not only

consistent with statutory construction, but also the legislative history, to which the court now turns.

Section 1339 of the OCSLA was based upon the limitations period of a 1919 onshore lands leasing statute, which was considered to be an "accrual" type of statute, *i.e.*, the limitations period did not begin to run until after the right had accrued. *See Hearings Before the Committee on Interior and Insular Affairs, United States Senate*, 83rd Cong., 1st Sess., 638-39 (1953). "It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued." *United States v. Wurts*, 303 U.S. 414, 418 (1938). The legislative history of section 1339 states simply:

> Section 10 [43 U.S.C. § 1339] provides that where a lessee has made payments to the Federal Government in excess of those required, repayment may be made to him. The Interior Committees of the Senate and House of Representatives will have a period of 30 days in which to examine proposed refunds before they are made.

S. Rep. No. 411, 83rd Cong. 1st Sess. 14 (1953). The legislative history intimates that repayments be made on payments "in excess of those required." Nowhere in the legislative history did Congress even hint that the statute should be changed from an accrual statute to a bar to claims that had yet to come into existence—defendant's position. *Wurts*, 303 U.S. at 418. The legislative history supports the court's reading of section 1339.

Defendant argued that the court must give deference to the agency's construction of section 1339.

Defendant correctly asserted that the statutory interpretation of an agency charged with the duty to administer the statute is usually given deference. *Beneficial Corp. v. United States*, 814 F.2d 1570 (Fed. Cir. 1987). The United States Court of Appeals for the Federal Circuit stated, "[w]e are not unmindful that, in matters of statutory interpretation, the construction adopted by an agency charged with the duty to administer that statute . . . is usually given deference." *Beneficial*, 814 F.2d at 1574 (citations omitted). The court continued:

> Giving deference, however, does not entirely dispense with meaningful review . . . . As stated in *American Lamb Co. v. United States*, 785 F.2d 994, 1001 (Fed. Cir. 1986), if the agency interpretation "contravenes clearly discernible legislative intent" or is otherwise unreasonable, it should not stand.

Beneficial, 814 F.2d at 1574 (citations omitted). When the legislative history reveals the clear intent of Congress, the judiciary and the agency must give effect to the unambiguously expressed intent of Congress. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-44 (1984). If, however, the court determines that Congress has not directly addressed the precise question at issue, the question for the court is whether the agency's answer is unreasonable or based on a permissible construction. *Id.* Assuming, *arguendo*, that the statutory construction and legislative history of section 1339 is unclear, the court now turns to the reasonableness of defendant's interpretation to determine whether any deference should be given to the agency in this instance.

Defendant would have the two year statute of limitations of section 1339 begin to run from the time an

initial royalty payment was made, whether or not it was excessive. Statutes of limitation have the purpose of barring stale claims; they do not serve to preclude claims that have not yet come into existence. Defendant's position would allow the statute of limitations to run and expire before any cause of action had accrued. Such a result is unreasonable and without judicial support. This court has repeatedly held that statutes of limitation begin to run only when a cause of action accrues. *American Tel. & Tel. Co. v. United States*, 231 Ct. Cl. 360, 368, 685 F.2d 1361, 1364 (1982). *Montana Bank of Circle v. United States*, 7 Cl. Ct. 601, 609 (1985). Nothing in the legislative history of section 1339(a) would lead one to conclude otherwise. Should defendant's motion be granted and the IBLA interpretation allowed to stand, each time a lessee made a royalty payment, it would necessarily have to file an immediate request for refund to protect its interests should the royalty payment later be declared excessive. Many of these requests would, at the time of filing, be unwarranted. This, however, would be the only method to insure the refund of an excess royalty payment. It requires little prescience to see that such a process would lead to an excessive burden for both lessees extracting oil and gas on federal lands and the governmental agencies overseeing those leases and refund request filings. This would be especially true when royalty payments are made on a monthly basis, as here. Such confusion and uncertainty could not have been the intent of Congress. Consequently, the court gives no deference to the agency construction of section 1339 because it is unreasonable and thus "should not stand." *Beneficial*, 814 F.2d at 1574.

Defendant also argued that when statutory interpretation is dependant upon the expertise of the agency with the duty of administering the statute, deference should be given to the agency's construction. The court areas in principle. The interpretation of the portion of section 1339 at issue, however, is not dependent on the agency's expertise. While the court does not dispute defendant's administrative duties in overseeing refunds and credits under the OCSLA, the statutory construction at issue deals with a statute of limitations. The resolution of such an issue does not depend on agency expertise; it is a question of law which this court may interpret without giving deference to the agency. *See Union of Concerned Scientists v. NRC*, 824 F.2d 108, 113 (D.C. Cir. 1987); *Pennzoil Co. v. FERC*, 789 F.2d 1128, 1135 (5th Cir. 1986). No deference need be given the agency in this instance.

In support of its position, defendant placed great weight on the Fifth Circuit opinion in *Shell Offshore, Inc. v. FERC*, 858 F.2d 1147 (5th Cir. 1988). Defendant directed the court to the following language from that case:

> Petitioners [plaintiffs] certainly should have known that the dry rule, which was highly controversial from its inception, had a high probability of being reversed, thus mandating repayments of overcharges . . . . The petitioners were also clearly aware of the requirements to file a request for repayment of royalty payments to MMS within two years of the date of payment under the plain terms of § 10(a) of OCSLA. On top of that, the Solicitor of the Department of Interior issued an opinion in 1981 addressing the very type of situation faced by petitioners:

> that is, how producers could protect their interests by filing notice with MMS.

Shell, 858 F.2d at 1152. While the *Shell* court did address related issues dealing with the same parties, the court expressly noted:

> Presently pending before the United States Court of Claims [sic] is the issue of whether the two year period begins to run at the time of payment to the MMS or at the time it was adjudicated in *INGAA-I* that overpayments were made.

Id. at 1151 n.4. It is the court's present determination, after analyzing the language of 43 U.S.C. § 1339, looking at the legislative history, and reviewing the reasonableness of defendant's interpretation, that the two year statute of limitations of section 1339 began, at the earliest, after the adjudication of *INGAA*.[2]

CONCLUSION

The court thus finds that defendant failed to show that it is entitled to judgment as a matter of law. Neither the IBLA decision nor defendant's memoranda exhibit any substantial evidence which would convince the court that their interpretation of section 1339 is permissible. In sum, after hearing oral argument, considering the parties' briefs, exhibits and the administrative record, the court finds defendant's construction of section 1339 unreasonable, and that the IBLA's decision lacked a rational basis. The

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[2] Plaintiffs filed their refund requests within two years of both the District Court decisions and the Supreme Court's denial of certiorari, and thus the court need not make the choice between the two in deciding when plaintiffs' rights actually accrued.

court therefore grants plaintiffs' motion for partial summary judgment and similarly dismisses defendant's motion. Pursuant to RUSCC 42(c), the court finds for plaintiffs on the issue of liability and orders the parties to determine quantum within 30 days of this Order.

IT IS SO ORDERED.

/s/ Moody R. Tidwell
MOODY R. TIDWELL
Judge

APPENDIX D

UNITED STATES CLAIMS COURT

No. 350-87 L, et al.

CHEVRON U.S.A., INC., ET AL.

vs.

THE UNITED STATES

At the Claims Court held in the City of Washington, on the 5th day of December, A.D. 1989, judgment was entered to be ordered as follows:

that plaintiffs recover of and from the United States as follows:

Plaintiff	Docket #	Refund Amount
AMOCO	409-87 L	$83,867.00
CHEVRON	350-87-L	$665,018.83
CONOCO	554-87 L	$66,536.00
EXXON, et al.	409-87 L	$2,089,184.00
MOBIL, et al.	679-87 L & 409-87 L	$610,027.00
PENNZOIL	352-87 L	$1,028,219.00
PHILLIPS	384-87 L	$41,439.34
POGO	353-87 L	$859,135.00
SHELL OFFSHORE INC.	391-87 L	$1,029,437.00

A true copy of record:

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this 5th day of December, A.D. 1989

/s/ [Illegible]
Clerk, Claims Court

Attest:

/s/ Loren A. Smith
LOREN A. SMITH
Chief Judge

APPENDIX E

UNITED STATES DEPARTMENT
OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF LAND APPEALS
4015 Wilson Boulevard
Arlington, Virginia 22203

SHELL OFFSHORE, INC.

IBLA 85-282 through 85-297 Decided March 17, 1987

Appeal from a decision of the Minerals Management Service denying Federal Energy Regulatory Commission order Nos. 93 and 93-A refund requests.

Affirmed in part; reversed in part.

1. Outer Continental Shelf Lands Act: Refunds

   The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), confers authority upon the Secretary of the Interior to approve refunds for overpayments arising from outer continental shelf leases and also authorizes the Secretary of the Treasury to make the payments.

2. Outer Continental Shelf Lands Act: Refunds

   The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), permits requests for refunds only within 2 years of the date payment is received by the appropriate office.

3. Administrative Procedure: Administrative Procedure Act—Regulations: Force and Effect as Law

"In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 301 (1979). It must be based on a grant of power by Congress and be promulgated in accordance with the requirements of the Administrative Procedure Act.

4. Administrative Procedure: Administrative Procedure Act—Regulations: Force and Effect as Law

   If a rule is substantive, it must be promulgated in accordance with the Administrative Procedure Act in order to have the force and effect of law. If, however, a rule is interpretive, the same proposition is true. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites to giving a regulation the binding effect of law." *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 315 (1979).

5. Outer Continental Shelf Lands Act: Refunds

   The refund provision of the Outer Continental Shelf Lands Act, 43 U.S.C. § 1339 (1982), requires requests for refunds be in writing, but does not specify the form the writing must take or its substantive contents. Requests arising after the date this opinion issues should be in writing, identify the claimant, the lease affected, and the reasons a refund is sought.

APPEARANCES: John T. McMahon, Esq., and Craig H. Walker, Esq., New Orleans, Louisiana, for Shell Oil Company and Shell Offshore, Inc.; Carmen

Chidester Farrell, Esq., Tulsa, Oklahoma, for Cities Service Oil and Gas Corporation and Oxy Petroleum, Inc.; Thomas J. Eastment, Esq., and Stephen L. Teichler, Washington, D.C., for Pogo Producing Company, Tenneco Oil Company, Pennzoil Oil & Gas, Inc., and Houston Oil & Minerals Corporation; James J. Doyle, Jr., Esq., Houston, Texas, for Exxon Co. U.S.A.; Donald J. Brannan, New Orleans, Louisiana, for Amoco Production Company; David T. Deal, Esq., Washington, D.C., for the American Petroleum Institute; Arthur P. Mitchell, Esq., New Orleans, Louisiana for Chevron U.S.A. Inc.; K. Susie Adams, Esq., Houston, Texas, for Gulf Oil Corporation; Camille N. Tarics, Esq., Houston, Texas, for Columbia Gas Development Corporation; Michael J. Manning, Esq., and James F. Moriarty, Esq., Washington, D.C., and Robert W. Haines, Esq., and Juliet Shepard, Esq., for Mobil Oil Corporation; Ernest J. Altgelt III, Esq., Carolyn S. Hazel, Esq., Merrill E. Fliederbaum, Esq., Houston, Texas, for Conoco, Inc.; Dennis E. Butler, Esq., Los Angeles, California, for Union Oil Co. of California; Robert J. Sinclair, Esq., Houston, Texas, for Aminoil Inc., Jennifer A. Cates, Esq., Bartlesville, Oklahoma, for Phillips Petroleum Company and Phillips Oil Company; Cass C. Butler, Esq., Office of the Solicitor, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

This is a consolidated decision of 16 appeals [1] brought by oil and gas producing companies which

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[1] The appellants, case numbers, and Minerals Management Service (MMS) file numbers of the appeals consolidated in this decision are:

hold leases issued under the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. §§ 1331-1356

IBLA 85-282	Shell Offshore, Inc.	MMS-84-0039-OCS
IBLA 85-283	Cities Service Oil and Gas Corp., et al.	MMS-84-0040-OCS
IBLA 85-284	Pogo Producing Company	MMS-84-0041-OCS
IBLA 85-285	Exxon Company, U.S.A.	MMS-84-0042-OCS
IBLA 85-286	Tenneco Oil Company, et al.	MMS-84-0043-OCS
IBLA 85-287	Pennzoil Oil & Gas, Inc., et al.	MMS-84-0044-OCS
IBLA 85-288	Amoco Production Company	MMS-84-0045-OCS
IBLA 85-289	American Petroleum Institute	MMS-84-0046-OCS
IBLA 85-290	Chevron U.S.A., Inc.	MMS-84-0051-OCS
IBLA 85-291	Gulf Oil Corporation	MMS-84-0074-OCS
IBLA 85-292	Columbia Gas Development Corp.	MMS-84-0075-OCS
IBLA 85-293	Mobil Oil Corp., et al.	MMS-84-0076-OCS
IBLA 85-294	Conoco, Inc.	MMS-84-0077-OCS
IBLA 85-295	Union Oil Company of California	MMS-84-0078-OCS
IBLA 85-296	Aminoil, Inc.	MMS-84-0079-OCS
IBLA 85-297	Phillips Petroleum Company	MMS-85-0001-OCS

By order of Feb. 7, 1985, these 16 appeals were consolidated with the appeal of Texaco, Inc., IBLA 85-281. On Apr. 5, 1985, Texaco, Inc., and the MMS entered into a Stipulation of Dismissal, and by order dated Apr. 15, 1985, IBLA 85-281 was segregated from the consolidated cases and dismissed with prejudice.

By order of Aug. 15, 1985, the appeal of Conoco Oil Co., Inc., IBLA 85-748, from a May 30, 1985, decision of the Director, MMS, denying royalty refund requests resulting from FPC opinion No. 598, was consolidated with similar cases for the purposes of briefing and decision. By order of Sept. 13, 1985, the appeals of Chevron U.S.A., Inc., and Gulf

(1982).[2] Pursuant to the Act, lessees are required to pay a royalty of not less than 12½ percent of the "amount or value of the production saved, removed or sold" as fixed by the Secretary of the Interior. *Id.* § 1337(a). MMS carries out the duty of the Secretary to establish the value of production. Included in the factors considered in establishing the value is the regulated price. 30 CFR 206.150. The regulated price of natural gas is set by the Federal Energy Regulatory Commission (FERC) acting under authority of the Natural Gas Act, 15 U.S.C. §§ 717-717w (1982), and the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§ 3301-3432 (1982).

I.

The appeals under consideration arise from a "final order" issued by MMS November 23, 1984, which, among other things, denied "all FERC Orders 93/93A refund requests which seek refunds of royalty payments made before November 9, 1981 on Federal Outer Continental Shelf (OCS) leases." 49 FR 47120 (Nov. 30, 1984). The denial was "based on the 2-year statute of limitations for royalty refund requests mandated by section 10 of the Outer Continen-

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Exploration and Production Company, IBLA 85-795, Shell Offshore, Inc., IBLA 85-796, and Kerr-McGee Corp., IBLA 85-797, were also consolidated for the purposes of briefing and decision. Although the consolidated cases raise a common issue of law, because those consolidated by the subsequent orders arise from different procedural and factual backgrounds, they will be ruled upon in a separate opinion.

[2] The current statutes derived from the OCSLA, P.L. 212, 67 Stat. 462, and the OCSLA Amendments of 1978, P.L. 95-373, 92 Stat. 629.

tal Shelf Lands Act (OCSLA), 43 U.S.C. 1339(a)." The order stated that it did not apply "to any lessee who filed a proper notice of MMS which tolled the 2-year statute."

FERC Order No. 93 established final rules applying to the sale of natural gas regulated under the NGPA. 45 FR 49077 (July 22, 1980).[3] Among the regulations promulgated was section 270.204 which established standard conditions for measuring the energy (Btu) content of natural gas for the purpose of determining its first sale ceiling price. Previously published interim rules had specified, as had regulations issued under the Natural Gas Act, that the measurement was to be made on gas "saturated with water vapor." 43 FR 56448, 56550 (Dec. 1, 1978); *cf.* 18 CFR 2.56a(c)(1)(iii), 2.56b(d)(1). The final rules retained this phrase, but the preface noted that the results obtained "must be converted to figures that reflect the actual condition of the gas on delivery in order to properly price the gas." 45 FR 49080 (July 22, 1980). The preface also stated that section 207.204 was effective 30 days from the date of issuance. *Id.* at 49081.

After issuing Order No. 93, FERC received a number of applications for rehearing, primarily from oil and gas pipeline and distribution companies. FERC denied the applications for rehearing but granted requests for clarification by Order No. 93-A. 46 FR

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[3] Because we are concerned only with the effect of FERC's rules on royalty payments made to MMS, we do not discuss the FERC's orders and their subsequent history in full detail. A more complete explanation may be found in *Interstate Natural Gas Association of America* v. *Federal Energy Regulatory Commission*, 716 F.2d 1 (D.C.Cir. 1983), *cert. denied*, 465 U.S. 1108 (1984).

24537 (May 1, 1981). Included in the discussion of the effective date of Order No. 93 was the statement: "Because Order No. 93 is but a clarification of the interim rule, it is effective for all first sales of natural gas made on or after December 1, 1978, the effective date of the interim rule." 46 FR 24543. Additional petitions for rehearing were filed with FERC and further administrative proceedings not of consequence here ensued. The outcome was that FERC issued an order reaffirming the December 1, 1978, effective date and adding a new subsection (c) to section 270.204. 47 FR 614 (Jan. 6, 1982). It stated: "The maximum lawful price prescribed by the NGPA and this part for any first sale of natural gas applies to the Btu's actually delivered in that first sale." *Id.* at 615.

Although the history of FERC's orders appears to be concerned with little more than a regulatory definition, the consequences of the definition are significant. The Btu content of natural gas varies with the mixture of various combustible hydrocarbons it contains and also with its noncombustible ingredients, including water vapor. Measuring the Btu content of a sample of gas "saturated with water vapor" (commonly referred to as "the wet rule") tends to understate the actual Btu content of the gas from which the sample was taken because water is added to reach the saturation point. Since the NGPA requires that maximum first sale prices be set in terms of "per million Btu," *see* 15 U.S.C. §§ 3318, 3319 (1982), the understated energy content lowers the price paid by pipeline and distribution companies to gas producers. Conversely, the language of the preface to the final regulations and subsequently adopted section 207.204 (c) requiring adjustment of prices for the energy

content of gas "actually delivered" (referred to as "the dry rule") raises the price paid to producers. Although the difference in the Btu content of gas measured under the wet and dry rules is usually small [4] and the corresponding price difference minimal, given the large volumes of natural gas normally flowing from producers to pipeline and distribution companies, the difference quickly becomes measured in millions of dollars.

Aware of the significant effect of the dry rule, particularly the potential liability for additional royalties on gas purchased prior to the issuance of Order No. 93-A, gas pipeline and distribution companies sought judicial review of FERC's orders. In *Interstate Natural Gas Association of America* v. *Federal Energy Regulatory Commission*, 716 F.2d 1 (D.C. Cir. 1983), the court found FERC's "dry rule to be inconsistent with the NGPA's language, structure, and legislative history," and "fundamentally at odds with the Btu measurement technique implicit in the NGPA." *Id.* at 14-15. Accordingly it vacated the "measurement of Btu content established in section 270.204." *Id.* at 16. The United States Supreme Court denied *certiorari* on March 19, 1984. 465 U.S. at 1108 (1984).

The significance of the content and history of FERC Orders Nos. 93 and 93-A for the present case is that they were used by MMS in calculating the value of production and consequently the royalties due on gas produced from leases held by appellants. Just

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[4] The effect of the wet rule was to raise the heating value of gas sold by up to 1.74 percent. Sharples & Pannill, "Calculation of Gas Heating Value is Complicated by the Courts." *Oil & Gas Journal* 47 (July 2, 1984).

as the higher Btu content resulting from measurements made using the dry rule would raise the maximum selling price producers could charge under the NGPA, so also it raised the amount of royalties due MMS. Conversely, recalculation of royalties due MMS under the wet rule will result in lower royalties due for gas produced or sold beginning December 1, 1978, and a refund to the producers. The consequence of MMS's final order under appeal is to deny refunds for royalty payments made prior to November 9, 1981, except for lessees who filed "proper notice."

II.

After receiving a number of requests for refunds from producers, on November 9, 1983, MMS issued a letter stating that because a final decision had not been rendered in the litigation, it would not accept "refund adjustments." *See* 49 FR 31779 (Aug. 8, 1984). The letter stated that FERC was seeking authority from the Department of Justice to file for *certiorari* and that MMS would establish "procedures for claiming refunds in the event that the lower court ruling is upheld." *Id.* It also advised producers who had "included FERC 93 or 93-A refund adjustments in prior MMS-2014 reports" to reverse the adjustments in their next monthly report. *Id.*

A month after the Supreme Court denied *certiorari*, MMS published procedures for applying for refunds. 49 FR 17824 (Apr. 25, 1984). Applicants were told to submit detailed information and documentation supporting their claims for refunds and, after receiving approval, submit revised MMS-2014's. Of importance to the present appeal, the instructions required a "showing that the payment for which a refund or credit is sought was made within 2 years of

the request," and referred applicants to a Solicitor's opinion. *See Solicitor's Opinion*, "Refunds and Credits Under the Outer Continental Shelf Lands Act," 88 I.D. 1090 (1981) (hereinafter *Solicitor Op.*).

Over 3 months later MMS published revisions to its instructions, changing the information producers were to supply in applying for refunds and giving notice that MMS review would be conducted by audit procedures. 49 FR 31779 (Aug. 8, 1984). In a section entitled "Tolling Periods" MMS found

> the 2-year statute of limitations mandated in section 10 of the Outer Continental Shelf Lands Act (OCSLA) was tolled for all payors on November 9, 1983, with a letter to all payors (see appendix below). For payors who submitted requests prior to that date that met the requirements of a section 10 claim under the OCSLA, the statute of limitations will be tolled as of the date the DOI [Department of the Interior] received the payor's request.

The Solicitor's opinion was again cited. The notice also set, based on a recently published FERC rule, separate dates for "the end of the tolling period" for large and small producers.[5] Finally, noting that some

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[5] The FERC publication referred to by MMS was notice of an interim rule under which FERC ordered large producers to make refunds to pipeline companies within 6 months and small producers to make refunds within a year. 49 FR 19293 (May 7, 1984). A producer was classified as large or small depending upon whether it had "sold a total of ten million Mcf (10 Bcf) or less of gas in both the intrastate and interstate markets in 1983." *Id.* at 19295. Using the times set by FERC, MMS stated that the end of the tolling period was

producers had reduced their royalty payments by the amounts they claimed due as refunds, MMS ordered them to pay the amounts deducted within 60 days, and stated that failure to do so "will be considered to be done knowingly and willfully," citing 30 U.S.C. § 1719(c)(1) (1982) and 43 U.S.C. § 1350(c) (1982).

Four months after publishing its revised instructions MMS issued the "final order" which is the subject of the present appeal. 49 FR 47120 (Nov. 30, 1984). It stated that MMS had received appeals from its August 8, 1984, notice establishing refund procedures, but that the agency did not regard the notice "as a final order from which an appeal may be taken." Accordingly, MMS dismissed the appeals it had received as "procedurally defective," but stated that the current "final order" could be appealed to this Board. As previously described, MMS then denied refund requests for royalty payments made before November 9, 1981. It noted that the order did not apply to lessees "who filed a proper notice with MMS which tolled the 2-year statute." "In order to have

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Nov. 3, 1984, for large producers and May 3, 1985, for small producers.

FERC's interim rule led to issuance of a final rule as Order No. 399. 49 FR 37735 (Sept. 26, 1984). Petitions for rehearing led FERC to stay the order and extend the deadline for refunds pending rehearing. 49 FR 43543 (Oct. 30, 1984). As a result of the petitions on rehearing, FERC revised its order by Order No. 399-A. 49 FR 46353 (Nov. 26, 1984). It also extended the deadline for large producers to Dec. 31, 1984. These orders were reviewed by the Court of Appeals for the District of Columbia over the issue of offsets which is not relevant in the present case. See *Interstate Natural Gas Association of America* v. *Federal Energy Regulatory Commission*, 756 F.2d 166 (D.C. Cir. 1985).

tolled the statute," MMS went on to state, " a payor must have given written notice to the Department of the challenge and of the approximate difference in amount should the challenge succeed," again citing the Solicitor's opinion. Finally, again based on FERC actions,[6] MMS extended the "tolling period" for large producers, but noted that the extension and the "revisions of refund criteria are not final orders for purposes of appeal."

III.

The central issue for decision in this appeal is whether MMS was correct in finding that 43 U.S.C. § 1339(a) (1982) precludes requests for refunds of royalty payments made prior to November 9, 1981. As discussed below, this issue involves questions about the application of the statute and its requirements for making refund requests.

In relevant part, 43 U.S.C. § 1339(a) (1982) provides:

> [W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after making of the payment * * *.

In general, appellants focus on the portion of the statute regarding payments "in excess of the amount * * * lawfully required to pay." They argue that their royalty payments were lawfully required at the

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[6] 49 FR 43543 (Oct. 30, 1984); see note 5 *supra*.

time they were made and did not become excess until the Supreme Court denied *certiorari* in the *Interstate* case on March 19, 1984. For this reason, they assert, it was not possible to file for a refund within 2 years of the actual date of payment because no refund was due until the Supreme Court's order. Indeed, some appellants state it was contrary to their interest to object because they received more for their production under the dry rule. In fact, numerous producers, including some of the present appellants, intervened in support of the orders in the litigation brought against FERC. For these and other reasons, they conclude that this Board should find the 2-year period provided by the statute did not begin to run until the date of accrual of their right to a refund.

Appellants also raise other arguments. Several point to various events which they contend tolled the statute either for all producers or for their own leases. Some contend that MMS's exclusion of their claims is a taking of their property in violation of the fundamental fairness requirements of the due process clause of the Fifth Amendment. A number of appellants also object to the manner in which MMS issued its notices, claiming violations of the rulemaking requirements of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-559 (1982).

In its answer, MMS focuses on the portion of the statute allowing repayment "if a request for repayment * * * is filed * * * within two years after the making of the payment." It argues that under this language the 2-year period begins when payment is tendered and that the act has the effect of barring requests made once the 2-year period has run. In reply to appellants, MMS points out that they could

have notified the Department of the refunds which would be due had the challenge to the FERC orders succeeded. MMS acknowledges that its letter of November 9, 1983, tolled the statute, but denies that either administrative or judicial review of the FERC orders had the same effect.

In presenting their arguments the parties cite and discuss the Solicitor's opinion referred to in MMS's notices as well as other administrative interpretations of similar statutes. The parties also argue about the applicability of this Board's decision in *Phillips Petroleum Co.*, 39 IBLA 393 (1979), and, to a lesser extent, *Shell Oil Co.*, 52 IBLA 74 (1981). No court has addressed the application of the statute in detail.[7] In considering the parties' arguments the Board has reviewed the Solicitor's opinion and examined OCSLA's legislative history.

IV.

[1] Section 1339 confers authority upon the Secretary of the Interior to approve refunds for overpayments made in regard to OCS leases and also authorizes the Secretary of the Treasury to make the payments. More precisely, it states that when the Secretary of the Interior is satisfied that an OCSLA lessee has made a payment "in excess of the amount he was lawfully required to pay," the excess "shall be repaid" if a request is filed "within two years after the making of the payment."

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[7] *See Pennzoil Offshore Gas Operators, Inc.* v. *Federal Power Commission*, 560 F.2d 1217, 1221 n.8 (5th Cir. 1977); *Placid Oil Co.* v. *United States Department of the Interior*, 491 F. Supp. 895, 900 (N.D. Tex. 1980).

Such a statute as this is needed because the United States Constitution prohibits drawing from the U.S. Treasury "but in Consequence of Appropriations made by law." U.S. Const. art. I, § 9, cl. 7; *see Reeside* v. *Walker*, 52 U.S. (11 Howard) 272 (1851); *Stizel-Weller Distillery* v. *Wickard*, 118 F.2d 19 (D.C. Cir. 1941). OCSLA requires that all sums paid on leases be deposited in the Treasury. 43 U.S.C. § 1338 (1982). Thus, absent express authority, the Secretary would be unable to order repayment of OCSLA funds deposited in the Treasury. The Department has recognized the constitutional requirement on numerous occasions. *See Solicitor Op., supra* at 1093 and cases cited in notes 3 and 4.

In Phillips Petroleum Co., supra at 398, the Board recognized that one purpose of section 1339 is "to require lessees to promptly verify their accounts and ascertain the correctness of payments made within the time provided." Unfortunately, the legislative history of section 1339 reveals little else about its purpose other than to meet the obvious administrative need to provide authority to make refunds. While OCSLA's financial provisions generated considerable controversy, the debate focused more on Federal aid to education and the need to repay the national debt (proposed purposes to which income from leases would be dedicated) than the scope of the Secretary's refund authority. The summary sections of the relevant committee reports tend to paraphrase the statute rather than elucidate it. *See, e.g.*, H. Rep. No. 413, 83d Cong., 1st Sess., *reprinted in U.S. Code Cong. & Ad. News* 2177, 2182 (1953). The most helpful comment appears in the section of the Senate committee report discussing committee amendments. It states: "Section 10, providing for refunds is similar to pro-

visions of Federal mineral leasing laws, with the additional requirement of notice to Congress in advance of repayment." S. Rep. No. 411, 83d Cong., 1st Sess. 26 (1953).

At the time OCSLA was enacted, Secretarial authority to refund payments made under the mineral leasing laws was provided by 43 U.S.C. § 98a (1954) (Act of June 27, 1930, ch. 642, 46 Stat. 822).[8] This statute made the Act of December 11, 1919, ch. 5, 41 Stat. 366, "applicable to all payments in excess of lawful requirements." It was enacted in 1930 after the Comptroller General determined that existing statutes did not apply to mineral lease payments because the mineral leasing laws were not "public land laws." Dec. Comp. Gen. A-28366 (Sept. 5, 1929); *cf. Udall* v. *Tallman*, 380 U.S. 1, 19, *reh'g denied*, 380 U.S. 989 (1965). The 1919 Act permitted refunds under two provisions. First, for applications "to make any filing, location, selection, entry or proof" the Act permitted repayment of "purchase moneys and commissions" if a request was made "within two years from the rejection of such application." 41 Stat. 366 (1919). Second, the Act provided that "in all cases" a person making a payment "under the public land laws in excess of the amount he was lawfully required to pay" would be repaid provided he "file[d] a request for the repayment of such excess within two years after the patent has issued for the

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[8] The statutes in effect were repealed by the Public Land Administration Act which contained a provision authorizing refunds. P.L. 86-649, § 204, 74 Stat. 506, 507 (1960) (codified at 43 U.S.C. § 1374 (1970)). This statute was in turn repealed by section 705(a) of the Federal Land Policy and Management Act of 1976, P.O. 94-579, 90 Stat. 2743, 2792-2793. The current statute is found at 43 U.S.C. § 1734(c) (1982).

land embraced in such payment." *Id.* No change in wording was made by Congress in extending the statute to mineral leases. *See* 46 Stat. 822 (1930).

The chief reason for enacting the 1919 legislation was that the existing statutes did not provide a time limitation for filing for refunds. *See* Act of March 26, 1908, ch. 102, 35 Stat. 48. It appears that a time limitation was deemed necessary because enterprising lawyers were searching Departmental records to find unrefunded payments and applying for refunds on behalf of those entitled to them, frequently many years after the event which gave rise to a claim. *See Solicitor Op., supra* at 1097-98 (quoting House debate).

Comparison of section 1339 with its predecessor reveals that the language relied on by appellants "("lawfully required to pay") was adopted unchanged while the language relied upon by MMS ("two years after the making of the payment") was substituted for the reference to the issuance of a patent. While this change received some attention at the time, *see* S. Rep. No. 411, 83d Cong., 1st Sess. 37 (1953) (report of Department of the Interior) and 99 Cong. Rec. 10474 (July 30, 1953) (amendment), a review of the legislative history does not disclose that the change was intended to do more than substitute a term appropriate to mineral leasing. Nevertheless, as the present case dramatically points out, the change was significant.

The earlier statute used the date a patent issues as the date the statutory 2-year period began to run. Issuance of a patent is the final action of the Department on a public land entry and transfers title from the United States to the patentee. *Smelting Co.*

v. *Kemp*, 104 U.S. 636 (1881). Until this event occurs, the land remains under the jurisdiction of the Department and the entry may be reviewed and cancelled. *Cameron* v. *United States*, 252 U.S. 450, 460 (1920); *Kirk* v. *Olson*, 245 U.S. 225 (1917); *Hawley* v. *Diller*, 178 U.S. 476, 488 (1900). For this reason, until a patent is issued (or the entry cancelled) it is not possible to determine whether a refund is due or, if so, its amount. Thus, the earlier statute based its time period on an event which necessarily corresponded to the date of accrual of a right to a refund. *Cf.* 20 Dec. Comp. Gen. 734, 736 (1941) (quoting letter from Secretary of the Interior).

[2] The wording "making of the payment" in section 1339, as the present case makes abundantly clear, does not identify an event which necessarily coincides with the event by which a right to a refund accrues. While Congress may have intended to merely substitute an equivalent term appropriate to the OCS leasing system in order to grant the Secretary sufficient authority to handle refunds, the language chosen was not adequate for the purpose. The statute conditions the authority of the Secretary to make repayment upon a request being filed "within two years after the making of the payment." A payment is made when it is tendered to the appropriate agency. *William E. Phalen*, 85 IBLA 151 (1985); *Mobil Oil Corp.*, 35 IBLA 265 (1978). There is no ambiguity in the wording of the statute; the terms of the Act cannot be varied simply because the appellants may for other reasons appear to deserve refunds. *See* 2A Sutherland, *Statutes and Statutory Construction* § 46.01 (4th ed., rev. 1984).

Nor does the 1941 opinion of the Comptroller General require a contrary conclusion. The problem the

Comptroller General confronted was that Congress, in extending existing statutes to mineral leasing, also extended them to grazing leases by its use of the term "leases," but grazing leases did not fall clearly within the language of the earlier statutes. The procedures by which grazing leases were issued did not involve the payment of "purchase moneys and commissions," the rejection of an "application, entry or proof," or the issuance of a patent. *See* 20 Dec. Comp. Gen. 734, 735-36 (1941). Thus, the intent of Congress to permit refunds of amounts paid for grazing leases created an ambiguity in the earlier statutes requiring interpretation to bring them within the scope of the 1930 legislation. In contrast, the wording chosen by Congress in enacting section 1339 is not ambiguous.

Because 43 U.S.C. § 1339 (1982) constitutes a grant of administrative authority, it is necessary to reject appellants' arguments that their 2-year period did not begin until they were aware a refund was due. The refunds at issue did not become due because of the *Interstate* ruling. Payments made by producers under the dry rule were always in excess of the lawful amount; the circuit court decision merely confirmed this fact. MMS is correct that, as the plain language of the statute indicates, the 2-year period for requesting refunds begins with the date of "the making of the payment." Accordingly, we affirm the result reached in *Phillips Petroleum Co., supra*, that under the statute a right to a refund must be asserted within 2 years of the date of payment.

Although repayment by the Secretary of the full amount of refunds sought by appellants to is not possible under section 1339, this conclusion does not foreclose other remedies which may be available to them.

In this regard, the Solicitor's opinion erred in applying Departmental interpretations of the 1919 refund statutes to section 1339. The Solicitor stated: "The Department interprets the limitation to be 'obviously against the claim and not merely against the remedy.'" The language quoted appeared in instructions issued by the Department, 49 L.D. 541, 544 (1923), and was quoted in a later decision, *Anthony, Legal Representatives of Middlebrook (On Rehearing)*, 51 L.D. 333, 335 (1926). While the statement may have been a correct interpretation of the 1919 Act because its time limitations ran from a date corresponding to the date a refund was due, such is not the case with section 1339. If applied to section 1339 and the present case, such an interpretation would dictate a finding that some of appellants' overpayment claims were extinguished prior to the date their payments became refundable following the circuit court's decision. Accordingly, section 1339 does not operate to extinguish any claims appellants may have. Nevertheless, as a practical matter, appellants may have little recourse but to petition Congress for relief.

V.

Next, the issue of the manner of making "a request for repayment" under section 1339 should be considered. Appellants raise both general and specific arguments as to the manner in which MMS has handled requests for refunds and issued the notices described in Part II. In general, they contend the notices impose substantive and procedural rules without benefit of the rulemaking procedures mandated by the APA. *See* 5 U.S.C. § 553 (1982). For this reason, they maintain the notices, particularly the "final order," are invalid. Appellants' specific arguments concern

several matters stated in the notices. They object to the dismissal of their appeals as "procedurally defective" in the notice of August 8, 1984, and point out that MMS nevertheless addressed the substance of the arguments raised in those appeals. They argue that the "tolling" determination under which MMS denied refund requests for payments made prior to November 9, 1981, is a substantive rule affecting their right to obtain refunds. They also object to the use of notices to establish the specific information which must be submitted to MMS to obtain a refund.

An additional point raised by appellants is both part of their general argument and a specific objection. As was previously observed, MMS's notices referred to a Solicitor's opinion in regard to the 2-year time period for requests made under section 1339, and its "final order" again referred to the opinion in stating its decision did not apply "to any lessee who filed a proper notice with MMS which tolled the 2-year statute." 49 FR 47120 (Nov. 30, 1984). Appellants argue that through these references MMS has imposed a substantive requirement regarding requests for refunds without proper rulemaking under the APA. They point out that a Solicitor's opinion is simply a legal opinion given by the Solicitor to the Secretary and argue that the standards it states are not derived from the statute. Nevertheless, they claim, MMS is applying the standard established by the Solicitor not only to their requests but also to all refund requests made to MMS. They additionally argue that the standards so set cannot be applied without publication in the *Federal Register* as required by 5 U.S.C. § 552(a) (1982).

To substantiate their arguments, several appellants have submitted copies of documents which they maintain constitute valid requests to the agency. For example, by letter dated September 3, 1983, Union Oil Company of California submitted to MMS reports for payment of its royalties due and enclosed a "Notice to Interest Owners." [9] The letter also asserted Union's position that the notice met the statute's 2-year requirement. The Union notice referred to the circuit court ruling and noted that it would result in a lower maximum lawful price of under 2 percent. Contingent upon the circuit court decision being upheld, it also asserted Union's intent to recover "excess amounts previously paid to you." By letter dated

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[9] The notice stated:

"The United States Court of Appeals for the District of Columbia Circuit (D.C. Court) issued a decision on August 9, 1983, vacating certain regulations established by the Federal Energy Regulatory Commission in Order No. 93 and Order No. 93-A. The D.C. Court's ruling, in effect, provides for a maximum lawful price slightly lower (under 2%) than that allowed pursuant to the above-mentioned Orders. Union Oil Company of California (Union) is in the process of appealing this decision.

"Union accounts to its royalty interest owners and other interest owners on the basis of actual proceeds received by Union. Subsequent to the issuance of Orders Nos. 93 and 93-A, some pipeline purchasers made additional payments in accordance therewith while other pipelines refused to make payments in accordance therewith until such time as a final non-appealable decision was reached on such issue.

"In the event that the D.C. Court's decision is upheld and only to the extent that Union is compelled to make a refund to your pipeline purchaser, Union will recover from you any excess amounts previously paid to you, plus any interest thereon, which Union is legally required to refund and which is attributable to your interest."

December 28, 1983, Union sent a copy of the notice to MMS, again asserting that it met the 2-year requirement. By letter dated March 14, 1984, MMS replied that the notice did not meet the 2-year requirement of the statute "as it does not contain the data requested in paragraph three below." The third paragraph of the letter stated in part:

> To satisfy the legal basis for tolling the Section 10 Statute of Limitations your refund request should contain; (1) an estimate of the amount of refund requested, (2) the basis for the refund, and (3) the time period involved. This data must be presented in sufficient detail to allow MMS to substantiate your request.

MMS has responded by arguing that its final order is not a rule as defined by the APA, and that even if it is, it is an interpretive rule excepted from notice and comment rulemaking under 5 U.S.C. § 553 (b)(A) (1982).

In relevant part the APA defines a "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency * * *." 5 U.S.C. § 551(4) (1982). Applying this definition, it is clear that through its notices MMS sought to establish rules governing refund requests.[10] MMS, however, correctly argues that the APA makes exceptions from its rulemaking requirements for "interpretive rules."

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[10] Although MMS asserts as a defense that its final order is not a rule, it offers no analysis or argument in support of this position. It does quote in a footnote the definition of "order" at 5 U.S.C. § 551(6) (1982).

5 U.S.C. § 553(b)(B) (1982).[11] Traditionally, this exception has been treated as establishing a distinction between interpretive and substantive rules. The APA, however, does not define these terms and courts have made a variety of statements about the differences between the two types of rules. Of particular concern in judicial pronouncements has been the issue of whether the rule under review is binding on the court in the case before it.

[3] In *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), Justice Rehnquist reviewed some of the Supreme Court's cases on the matter and outlined the steps under which judicial review proceeds. "In order for a regulation to have the 'force and effect of law,' it must have certain substantive characteristics and be the product of certain procedural requisites." *Id.* at 301. A substantive rule is one " 'affecting individual rights and obligations.' " *Id.* at 302 (quoting *Morton* v. *Ruiz*, 415 U.S. 199, 232 (1974)). Because the legislative power of the United States is vested in Congress, if a rule is substantive, it "must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Id.* In addition,

> the promulgation of these regulations must conform with any procedural requirements imposed by Congress. *Morton* v. *Ruiz*, *supra*, at 232. For agency discretion is limited not only by substan-

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[11] Section 553 provides two exceptions for interpretive rules. First, under subsection (b)(A) interpretive rules are excepted from the requirement to publish notice of proposed rulemaking. Second, under subsection (d) an exception is provided to the requirement that publication of a rule occur 30 days prior to its effective date.

> tive, statutory grants of authority, but also by the procedural requirements which "assure fairness and mature consideration of rules of general application." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). The pertinent procedural limitations in this case are those found in the APA.

Id. at 303.

[4] The Secretary of the Interior is given full authority to administer the provisions of OCSLA and to "prescribe such rules and regulations as may be necessary to carry out such provisions." 43 U.S.C. § 1334(a) (1982). MMS has not formally promulgated regulations governing refunds. *See* 30 CFR Part 230. Nevertheless, there is no need to determine whether MMS' notices constitute such rules and regulations within the authority of OCSLA or to delve into the complexities of the differences between substantive and interpretive rules and the concomitant questions about substantial impact. *See generally* 2 Davis, *Administrative Law Treatise* §§ 7.8 through 7.20 (2d ed. 1979 and Supp. 1982). If a rule is *substantive*, it must be promulgated in accordance with the APA in order to have the "force and effect of law." *Chrysler Corp.* v. *Brown*, *supra*. Nothing in the notices issued by MMS indicates that they were published pursuant to the notice and comment rulemaking procedures described by 5 U.S.C. § 553 (1982). Thus, they cannot have the force and effect of law. The same is true if, on the other hand, the notices are *interpretive* rules. "It is enough that such regulations are not properly promulgated as substantive rules, and therefore not the product of procedures which Congress prescribed as necessary prerequisites

to giving a regulation the binding effect of law." *Id.* at 315.

If the question presented was whether MMS had authority to determine what information it needed in order to process refund requests, as in its notice of April 8, 1984, it is unlikely we would have difficulty concluding that it has such authority. If the next question was whether MMS could publish a list of the necessary information in the *Federal Register*, we would agree that it can and point out that such publication may be required by 5 U.S.C. § 552(a) (1982). Similarly, it would seem apparent that MMS may determine that it does not need all the information it first thought necessary, modify its list, perhaps adding different information, and publish a notice, as MMS did in its notice of August 8, 1984. Whether these decisions are to be termed administrative matters, procedural determinations, or interpretive rules is generally of little consequence. They do not have the force and effect of law in the sense that substantive rights of parties cannot be affected. An application for a refund need not be approved until sufficient information has been supplied, but the rejection of an application would not prejudice the substantive rights of the applicant to obtain a refund. It would simply need to submit the information needed to support its request. Of course, such procedures cannot be administered in a manner that is otherwise not in accord with the law, but such issues are of no concern here.

The gravamen of appellants' complaints is that MMS has viewed its notices and the Solicitor's opinion as having substantive effect on appellants' claims to refunds. From the example of Union Oil Company's letter and notice it is clear that MMS views

the standards drawn from the Solicitor's opinion as substantive requirements governing requests for refunds even though MMS's response failed to state why the company's submission was deemed insufficient. MMS's notices are not a substitute for promulgated regulations; nor can the Solicitor's opinion be given such weight. By its notices MMS announced the manner in which it would review, and has reviewed, requests for refunds, but neither its notices nor the Solicitor's opinion can limit the rights of parties or control review by this Board. *See* 43 CFR 4.1; *Guardian Federal Savings & Loan Ass'n* v. *Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 664-65 (D.C. Cir. 1978); *Northern California Power Agency* v. *Morton*, 396 F. Supp. 1187, 1191 (D.D.C. 1975), *aff'd*, 539 F.2d 243 (D.C. Cir. 1976). To the extent MMS has sought by the publication of its notices to impose substantive consequences upon appellants' claims to refunds, these determinations must be reexamined by the agency. Because MMS's final order did not address the specific requests raised by appellants, we do not consider these refund requests to be ripe for review. Since this matter must be remanded to MMS for further action, upon reconsideration by the agency and the issuance of specific decisions further appeal to this Board may be appropriate.

[5] Absent controlling regulations, the only standard which may be applied is that of the language of section 1339 itself. The Solicitor's opinion previously cited is correct in concluding that because section 1339 states a request is to be "filed," it must be made in writing. However, there is no language in the statute indicating the form the writing must take or specifying its substantive contents. The word "re-

quest" does not entail any substantive requirements. If Congress intended anything in adopting the term from the earlier statute, it is likely it had in mind overpayments resulting from computational errors and the use of estimates in making payments, and it assumed the Department would establish forms and promulgate procedures for supplying the accounting information necessary to obtain refunds. *Cf.* 43 CFR 217 (1949 and Supp. 1953). If Congress had wished, it could have written specific requirements into the statute. Instead, it appears to have left the matter to the Department and the only affirmative requirement indicated by the statute is that some form of written request is required. Undoubtedly, to be effective a request must in some manner inform MMS of the subject of the refund rather than merely stating "I want a refund;" however, the statute does not limit the form a request may take. While in the normal course of business notice would likely be given by letter, the statute does not specify a particular type of document. Thus, in reviewing appellants' cases, MMS should consider whether other documents received from lessees provided notice that the submitting party desired a refund. In addition, we find that there should be minimum requirements for making refund requests; future requests arising after the date this opinion issues should, at a minimum, be written, identify the claimant, the leases affected, and the reasons a refund is sought.

The notice necessary to meet the 2-year provision of the statute must be distinguished from the proof necessary to substantiate a request. MMS has administrative and fiscal responsibilities to assure itself that a refund is permitted by law and that the applicant is in fact entitled to a refund. As stated in sec-

tion 1339, MMS must be satisfied that a party has made payment "in excess of the amount he was lawfully required to pay." Clearly it is lawful to place on a claimant both the legal and evidentiary burdens of showing entitlement to a refund. It does not follow, however, that such a burden must be met at the outset by a request filed to meet the statute's 2-year limit. A request must timely notify MMS that a party seeks a refund. In contrast, proof of a valid claim must be sufficient to allow MMS to meet its responsibility to satisfy itself that a refund is due. As in the present case, such proof may ultimately require both resolution of legal issues and submission and review of detailed records on the payments made on production from numerous wells.

VI.

The Secretary's authority to administer the provisions of OCSLA and to "prescribe such rules and regulations as may be necessary to carry out such provisions," 43 U.S.C. § 1334(a) (1982), support the promulgation of regulations establishing procedures for filing refund requests. Fundamentally, it may be said, the present cases arises because MMS had not promulgated rules for filing notices and making applications for refunds. Nor has it since. Given the absence of any controlling regulations, it is necessary to specify the manner in which the parties should proceed upon remand. Because section 1339 states that requests must be filed "within two years after the making of the payment," it was clearly improper for MMS to attempt to prevent producers from filing refund requests by announcing it would not accept such requests. Apparently in recognition of the fact its letter of November 9, 1983, may have

prejudiced producers' rights, MMS sought to remedy its error by finding the letter had "tolled" the statute. While "tolling" was not the proper term to use, because MMS does not deny that the producers may obtain refunds for overpayments made on or after November 9, 1981, we will construe its letter as an acknowledgement of notice that as a result of the circuit court decision in *Interstate* all producers would seek refunds. Accordingly, refunds may be obtained for overpayments made on or after November 9, 1981. Producers who believe they filed notice with MMS prior to November 9, 1983, and are therefore entitled to a refund for overpayments made prior to November 9, 1981, should submit to MMS documentation establishing the fact. The producer should also submit an application showing its entitlement to a refund by providing the data required by MMS in its published notices. MMS' determinations of producers' applications shall be made by written decisions appealable through the ordinary appeals process. In the future MMS should not attempt to foreclose lessees' attempts to file refund requests.

MMS' "final order" also stated that those appealing "should include with their notice of appeal a schedule of the royalty payments made after December 1, 1978, that they assert would be subject to refunds but for this decision." 49 FR 47120 (Nov. 30, 1984). Several appellants have objected to this language or made requests to be permitted to later supply additional information because of the limited time for gathering it within the deadline for filing a notice of appeal. It is unclear why the statement was included in the final order. The information described was not necessary to the resolution of the legal issues presented the Board by MMS's decision. It would

seem beyond question that appellants paid royalties as required by MMS based on its calculations using FERC Orders Nos. 93 and 93-A. Nor is it clear what was meant by "a schedule of the royalty payments." Presumably this was intended to require more than just a list of the dates payments were made. In any event, it is not our task to conduct initial review of such information. After MMS has examined the data and documentation supplied by producers in support of their refund requests and has made a decision as to the amount a producer is entitled to receive, and after MMS appeal procedures have been followed, then an appeal may be brought to us. At that time we would review the information to resolve any issues presented to us. Because the requirement stated in the final order was unnecessary, appellants are not to be prejudiced by any information supplied or the absence of such information in presenting their appeals to this Board.

Accordingly, all other arguments of the parties having been considered, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed in part.

/s/ Franklin D. Arness
FRANKLIN D. ARNESS
Administrative Judge

I concur:

/s/ Wm. Philip Horton
WM. PHILIP HORTON
Chief Administrative Judge

I concur in the result:

/s/ Kathryn A. Lynn
KATHRYN A. LYNN
Administrative Judge
Alternate Member

APPENDIX F

Minerals Management Service

Final Order on Royalty Refund Requests Resulting from FERC Orders 93/93A

AGENCY: Minerals Management Service (MMS), Interior.

ACTION: Final Order on Royalty Refund Requests Resulting from FERC Orders 93/93A.

SUMMARY: The purpose of this notice is to issue a final order by the Director of the Minerals Management Service, appealable to the Interior Board of Land Appeals (IBLA), on certain royalty refund requests made as a result of the decision in *Interstate Natural Gas Associate of America et al.* v. *FERC.*

FOR FURTHER INFORMATION CONTACT:

Mr. Milton Dial, Chief, Royalty Compliance Division, FTS 326-231-3011, (303) 231-3011

Mr. James Detlefs, Chief, Fiscal Accounting Division, FTS 326-3261, (303) 231-3281

SUPPLEMENTARY INFORMATION: As a result of *Interstate Natural Gas Association et al.* v. *FERC,* 716 F.2d 1 (D.C. Cir. 1983), *cert. den.*, 104 S. Ct. 1616 (1984), MMS has determined that certain payors of royalties on Federal and Indian leases are eligible to request refunds of a portion of royalties paid on natural gas for the period from December 1, 1978, to December 8, 1983.

I. Final Order

The Department of the Interior has received a number of appeals from its August 8, 1984, notice of refund procedures and order to pay royalties (49 FR 31779).

The MMS does not view the August 8, 1984, notice on tolling period as a final order from which an appeal may be taken. Therefore, all appeals of the tolling period filed on the August 8, 1984, notice are dismissed as being procedurally defective. (The order to pay royalty in that notice was a final order.) The Director of the MMS has now issued this final order, from which an appeal may be taken to the IBLA, on certain FERC Orders 93/93A royalty refund requests.

Through this order MMS denies all FERC Orders 93/93A refund requests which seek refunds of royalty payments made before November 9, 1981, on Federal Outer Continental Shelf (OCS) leases. This final Director's order is based on the 2-year statute of limitations for royalty refund requests mandated by section 10 of the Outer Continental Shelf Lands Act (OCSLA) 43 U.S.C. 1339(a). The order does not apply to any lessee who filed a proper notice with MMS which tolled the 2-year statute. (See Sol. Op. M-36942, 88 I.D. 1090, 1100-1102 (1981)).

Arguments made by various payors which claim that the 2-year period has not run against their refund requests can be summarized as either disputing the time at which the 2-year period began or contending that some subsequent event tolled the statute. The MMS has considered the issues and has concluded that the clear language of section 10 mandates that the 2-year period commence upon the receipt of pay-

ment by DOI, or its administering agencies or bureaus. The day of "payment" in section 10 cannot be read to mean "the day on which a payment became an overpayment." This position was upheld in *Phillips Petroleum Co.*, 30 IBLA 393, 397 (1079).

In order to have tolled the statute during the judicial resolution of FERC Orders 93/93A, a payor must have given written notice to the Department of the challenge and of the approximate difference in amount should the challenge succeed. See Sol. Op. M-36942, 88 I.D. 1090 (1981). A payor may not *post facto* toll the statute by waiting judicial resolution to notify the Department.

Those payors wishing to appeal this final decision to the IBLA should include with their notice of appeal a schedule of the royalty payments made after December 1, 1978, that they assert would be subject to refunds but for this decision pursuant to section 10 of the OCSLA.

II. Notice of Extension of Tolling Period and Revision of Refund Criteria

The MMS will accept documentation showing that refunds have been paid on the non-royalty portion of the claim as sufficient to justify a refund of royalties paid under FERC Orders 93/93A for the royalty portion. Documentation of the non-royalty portion should follow the format required in the MMS' previous Federal Register notices of August 8 and April 25, 1984.

The MMS will also honor the extension given to large first sellers by FERC in its "Order Granting Stay and Rehearing for the Purpose of Further Consideration," issued October 24, 1984, and may honor

subsequent extensions granted by FERC. The October 24 extension will change the end of the MMS' tolling period for claims under section 10 of the Outer Continental Shelf Lands Act, as amended, from November 9, 1984, until FERC issues a final order on the merits of the petitions for rehearing. This extension of tolling period and revisions of refund criteria are not final orders for purposes of appeal.

Dated: November 25, 1984.

William D. Bettenberg,

Director, Minerals Management Service

APPENDIX G

The non-wholly owned subsidiaries of petitioner Phillips Petroleum Co. are:

ACE LIMITED
ALYESKA PIPELINE SERVICE COMPANY
ANIMAL VACCINE RESEARCH CORPORATION
ARCTIC LNG TRANSPORTATION COMPANY
AS BIOTEC-MACKZYMAL
BISSENDORF BIOSCIENCES GMBH
CANYON REEF CARRIERS, INC.
CHISHOLM PIPELINE COMPANY
COLONIAL PIPELINE COMPANY
CORPORATE OFFICERS AND DIRECTORS ASSURANCE HOLDING LTD
CRISTAL LIMITED
DIXIE PIPELINE COMPANY
EAST TEXAS SALT WATER DISPOSAL COMPANY
EXPLORER PIPELINE COMPANY
FLTG INC.
GREAT YARMOUTH PORT LABOUR COMPANY LIMITED
HEAT TRANSFER RESEARCH, INC.
KENAI LNG CORPORATION
KS BIOTEC-MACKZYMAL
MULTINATIONAL GAS AND PETROCHEMICAL SERVICES LIMITED
NORLAND GMBH FUR GRUNDBESITZ UND INDUSTRIEANLAGEN
NORPIPE A.S
NORPIPE PETROLEUM UK LIMITED
NORSEA GAS A/S

NORSEA GAS GMBH
NORSEA PIPELINE LIMITED
OIL CASUALTY INSURANCE LTD.
OIL INSURANCE LIMITED
PHANTEX PIPELINE COMPANY
PHILLIPS PETROLEOS CHILE S.A.
PHILLIPS PETROLEUM SINGAPORE CHEMICALS (PRIVATE) LIMITED
PHILLIPS PETROLEUM TANKER MANAGEMENT, LIMITED
PHILLIPS PLASTIC RECYCLING PARTNERSHIP
PHILLIPS RECYCLING TECHNOLOGY PARTNERSHIP
PHILLIPS-IMPERIAL PETROLEUM LIMITED
PIRO IMPLEMENTATION, INC.
POLAR LNG SHIPPING CORPORATION
RENOLIT—HAUS GMBH
SPODCO LIMITED
SPODCO-USA, INC.
THE SALK INSTITUTE BIOTECHNOLOGY/ INDUSTRIAL ASSOCIATES INC.
WADLEY BIOSCIENCES CORPORATION
WESTERN DESERT OPERATING PETROLEUM COMPANY (WEPCO)

APPENDIX H

The Chevron-affiliated companies with publicly traded shares or debt securities are:

CANYON REEF CARRIERS, INC.
CHEVRON CANADA ENTERPRISES LIMITED
CHEVRON CAPITAL U.S.A. INC.
CHEVRON CHEMICAL COMPANY
CHEVRON CORPORATION
CHEVRON OIL FINANCE COMPANY
CHEVRON U.S.A. INC.
FELIX OIL COMPANY
GULF OIL FINANCE N.V.
HORIZON GOLD CORPORATION
KEWANEE INDUSTRIES, INC.

Supreme Court, U.S.
FILED
AUG 30 1991
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Nos. 91-1 and 91-34

In the Supreme Court of the United States

OCTOBER TERM, 1991

PHILLIPS PETROLEUM CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PENNZOIL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under 43 U.S.C. 1339(a), the Secretary of the Interior is authorized to refund certain royalty payments if a request for a refund "is filed * * * within two years after the making of the payment." The question presented in this case is whether the two-year period runs from the date the payment is made, or from a later date when the payor determines, on the basis of a judicial ruling, that the amount of the payment was incorrect.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-1

PHILLIPS PETROLEUM CO., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 91-34

PENNZOIL COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App.[1] 1a-8a) is reported at 923 F.2d 830. The decision of the United States Claims Court (Pet. App. 13a-24a) is reported at 17 Cl. Ct. 537. The decision of the Interior Board of Land Appeals (Pet. App. 25a-55a) is reported at 96 I.B.L.A. 149. The decision of the

[1] References in this brief to "Pet. App." refer to the appendix to the petition in No. 91-34.

Minerals Management Service (Pet. App. 64a-67a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1991. Pet. App. 1a. A timely petition for rehearing was denied on April 4, 1991. Pet. App. 10a-11a. The petitions for a writ of certiorari were filed on June 28, 1991 (No. 91-1), and July 3, 1991 (No. 91-34). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to the Outer Continental Shelf Lands Act (OCSLA), 43 U.S.C. 1331-1356, the Minerals Management Service (MMS) in the Department of the Interior leases lands under the control of the federal government on the outer Continental Shelf [2] to oil and gas producers. 43 U.S.C. 1337. Pursuant to the statute, the leases typically provide for payment of a royalty to the United States of at least 12.5% of the "amount or value of the production saved, removed, or sold." 43 U.S.C. 1337(a)(1)(A). Section 1339(a) sets forth the circumstances under which a producer may seek to recover amounts erroneously paid to the Secretary as royalties:

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[2] Section 1331(a) defines the outer Continental Shelf as

> all submerged lands lying seaward and outside of the area of lands beneath navigable waters as defined in section 1301 of this title, and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control.

As relevant to this case, the "lands beneath navigable waters" excluded from the outer Continental Shelf under this definition generally are lands within three miles of the coast line of each State. See 43 U.S.C. 1301(a)(2).

> [W]hen it appears to the satisfaction of the Secretary that any person has made a payment to the United States in connection with any lease under this subchapter in excess of the amount he was lawfully required to pay, such excess shall be repaid without interest to such person or his legal representative, if a request for repayment of such excess is filed with the Secretary within two years after the making of the payment, or within ninety days after August 7, 1953.

2. Petitioners are various oil and gas producing companies that lease federal lands on the outer Continental Shelf from MMS. In 1978, the Federal Energy Regulatory Commission (FERC) issued regulations pursuant to the Natural Gas Policy Act of 1978, 15 U.S.C. 3301-3432, that changed the method of measuring and valuing natural gas production. 43 Fed. Reg. 56,448. As applied to petitioners, the new regulations generally entitled them to charge a higher price for the natural gas produced under their offshore leases; accordingly, petitioners paid higher royalties to the United States. A group of natural gas purchasers sought judicial review of FERC's regulations and eventually succeeded in having them overturned. *Interstate Natural Gas Ass'n of Amercia* v. *FERC*, 716 F.2d 1 (D.C. Cir. 1983), cert. denied, 465 U.S. 1108 (1984) (*INGAA*). Accordingly, petitioners were required to refund to the purchasers the excess amounts they had charged under the invalidated FERC regulations. See *Refunds Resulting From Btu Measurement Adjustments*, FERC Order No. 399, 49 Fed. Reg. 37,735 (1984).

3. Petitioners, in turn, sought a refund from MMS of the excess royalties they had paid to the

United States while the FERC regulations were in effect. Relying on Section 1339(a), MMS generally determined that refunds were not available to the extent that petitioners sought refunds for amounts paid more than two years before they filed their refund claims. Pet. App. 64a-67a.[3] MMS relied heavily on a previously published opinion of the Solicitor of the Interior, which had concluded that the two-year period described in Section 1339(a) runs from the date of payment in situations like this. See *Refunds and Credits Under the Outer Continental Shelf Lands Act*, 88 Interior Dec. 1090 (1981) (*OCSLA Refunds & Credits*). Relying on *Phillips Petroleum Co.*, 39 I.B.L.A. 393 (1979), the Solicitor explained in *OCSLA Refunds & Credits* that the purpose of Section 1339 is "to require lessees to verify their accounts promptly." 88 Interior Dec. at 1100. He also considered the "special case * * * presented by a retroactive change in the regulated price of oil or gas" and concluded that where FERC agrees to lower the price retroactively, "[t]he two-year limit still applies from the date of payment; but the lessee can interrupt the period by notifying the Department in writing of the challenge." *Id.* at 1101-1102. Consistent with that interpretation, MMS concluded in the instant case that "[a] payor may not *post facto* toll the statute by waiting judicial resolution to notify the Department." Pet. App. 66a.

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[3] MMS did determine that the two-year period described in Section 1339(a) was tolled by a letter it issued on November 9, 1983, announcing that it would issue instructions for seeking refunds based on *INGAA*. Accordingly, the only claims at issue in this case are for royalties paid before November 9, 1981, with respect to which the two-year period already had run before MMS issued its November 9, 1983, letter. See Pet. App. 32a-33a, 49a-50a.

4. The Interior Board of Land Appeals rejected petitioners' challenge to MMS's interpretation of Section 1339(a). Pet. App. 25a-55a. The Board explained:

> The statute conditions the authority of the Secretary to make repayment upon a request being filed "within two years after the making of the payment." A payment is made when it is tendered to the appropriate agency. There is no ambiguity in the wording of the statute; the terms of the Act cannot be varied simply because [petitioners] may for other reasons appear to deserve refunds.

Pet. App. 40a (citations omitted).[4]

5. The Claims Court disagreed with the Board's interpretation and held that petitioners' requests for refunds are not time-barred. Pet. App. 13a-24a. The court acknowledged that the language of Section 1339(a) requiring a refund request to be filed within two years of payment "would appear to support" the government's interpretation. Pet. App. 18a. But the court nevertheless accepted petitioners' argument that because Section 1339(a) provides for the refund of "excess" payments, the two-year period did not begin to run until the D.C. Circuit held the FERC regulations invalid. Only then, the court reasoned, did petitioners make excess payments. Pet. App. 19a. In addition, relying on *United States* v. *Wurts*, 303 U.S. 414, 418 (1938), the court concluded that the statute

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[4] The Board also reversed certain aspects of MMS's ruling related to the types of information producers must supply in order to receive refunds. See Pet. App. 50a-51a. That portion of the Board's ruling was not challenged in the Claims Court or the court of appeals and thus is not before this Court.

should be construed so that "the limitations period did not begin to run until after the right had accrued." Pet. App. 20a. Here, the court believed that the right to a refund did not accrue until the D.C. Circuit rendered its decision in *INGAA*. Pet App. 20a-21a.

6. A panel of the Court of Appeals for the Federal Circuit unanimously reversed. Pet. App. 1a-8a. The court noted that the "language requires lessees to request the refund of any excess payment 'within two years after the making of the payment,' " and concluded that "[b]y its terms, this phrase requires a request within two years from the time a lessee makes its original royalty payment." *Id.* at 5a. In response to the Claims Court's conclusion that a payment was not made until it was found to be excessive, the court explained (*id.* at 6a):

> The statute does not state that a lessee must request a refund "within two years after discovery that a payment was excessive." Nor does the statute state that a lessee must request a refund "within two years after a judicial determination rendering a payment excessive." The statute requires a request "within two years after the making of the payment." By interpreting the OCSLA otherwise, the Claims Court erred.

The court of appeals further held that petitioners were aware prior to the decision in *INGAA* of the basis for claiming that the amounts of their royalty payments were incorrect, because they were aware that gas purchasers would challenge the FERC regulations to which their royalty rates were tied. *Id.* at 7a.

ARGUMENT

The decision of the court of appeals, which turns on the particular—and unambiguous—language of 43 U.S.C. 1339(a), is correct and does not conflict with the decision of any other court of appeals. Petitioners were fully on notice that the FERC regulations that affected the amount of their royalty payments were being challenged by gas purchasers; indeed, a number of the petitioners were parties to the proceedings in the D.C. Circuit in *INGAA*. Yet petitioners failed to avail themselves of the procedures established by MMS that permitted them to preserve their refund claims pending the resolution of *INGAA* simply by filing a notice to that effect with MMS. The decision below therefore does not result in any unfairness to petitioners. Although petitioners assert that the MMS procedures will result in a flood of unnecessary protective refund requests in circumstances such as these, the experience of the decade since the Solicitor of the Interior rendered the formal decision approving these procedures and MMS adopted them does not support that assertion, or suggest that the common-sense application of Section 1339(a) by the agency responsible for its implementation is impracticable. Further review therefore is not warranted.

1. This is a case in which the language of the statute should be both the beginning and the end of the inquiry. Cf. *United States* v. *Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989). The statute bars the Secretary from making refunds unless a refund request is filed with the Secretary "within two years after the making of the payment." Petitioners failed to file a request for refund of the payments at issue here within two years of when they were made. They therefore have no right to receive a refund.

Inasmuch as the statute imposes a condition on a waiver of the sovereign immunity of the United States, the courts "must be careful not to interpret it in a manner that would extend the waiver beyond that which Congress intended." *United States* v. *Dalm*, 110 S. Ct. 1361, 1368 (1990) (internal quotation marks omitted); see *id.* at 1369 ("If any principle is central to our understanding of sovereign immunity, it is that the power to consent to such suits is reserved to Congress."). Here, petitioners' argument (91-1 Pet. 13; 91-34 Pet. 13-14) that a "payment" is "made" only when a court later determines that the payment was excessive is at best unnatural. Especially in light of the established rule against broad interpretations of waivers of sovereign immunity, petitioners' strained reading of Section 1339(a) should be rejected.

Indeed, just two Terms ago in *Dalm*, this Court rejected a substantially identical claim with respect to the limitations period in 26 U.S.C. 6511(a). Section 6511(a) requires a taxpayer to file certain claims for a refund of overpayment of a tax "within 3 years from the time the return was filed or 2 years from the time the tax was paid, whichever of such periods expires the later." In 1976, Dalm filed a gift tax return and paid a gift tax of approximately $19,000. After the Internal Revenue Service determined in 1984 that the same transaction was subject to the income tax, rather than to the gift tax, Dalm promptly filed a claim for a refund of the gift tax. 110 S. Ct. at 1363-1364. Dalm contended that her claim was timely because "the gift tax was not paid for the purposes of § 6511(a) until 1984, when it was determined that she owed income tax on the same transaction under an inconsistent theory. So, she assert[ed], her cause of action for refund of gift

tax did not arise until that time." *Id.* at 1369 n.7. This Court firmly rejected that argument (*ibid.*):

> We disagree. The most sensible interpretation of § 6511(a) is that a tax is paid when the taxpayer tenders payment of the tax to the IRS, not when the taxpayer discovers that the payment was erroneous. The very purpose of statutes of limitation in the tax context is to bar the assertion of a refund claim after a certain period of time has passed, without regard to whether the claim would otherwise be meritorious. That a taxpayer does not learn until after the limitations period has run that a tax was paid in error, and that he or she has a ground upon which to claim a refund, does not operate to lift the statutory bar.[5]

In this case, just as in *Dalm*, the most sensible interpretation is that a payment is made when the payor tenders payment, not when the payor later concludes that the amount of the payment was calculated incorrectly. There is no basis for an exception to that rule here simply because the D.C. Circuit, more than two years after the payments were made, overturned the FERC orders that had set the ceiling price to which the royalty rates were tied. Here, as in *Dalm*, the "very purpose" of the limitations period is to establish repose and protect the fisc by barring claims against the Treasury after passage of the specified period, even if subsequent events show a payment to have been excessive. There accordingly is no need for this Court to review the

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[5] In light of the close historical relation between Section 1339 and the refund provisions of the tax laws, see *OCSLA Refunds & Credits*, 88 Interior Dec. at 1096-1098, this Court's interpretation of the refund provisions of the tax laws is especially relevant in applying Section 1339.

judgment of the court of appeals applying the unambiguous language of Section 1339.

2. Implicitly recognizing that the language of the statute Congress enacted forecloses their claim, petitioners rely heavily on the principle that statutes of limitations should be construed so that they do not commence to run until the cause of action has accrued. 91-1 Pet. 14-19; 91-34 Pet. 14, 16-20. But none of the cases cited by petitioners has any relevance to the situation presented here, because—unlike *Dalm*, which strongly supports the decision below—none involved actions against the United States. Accordingly, in none of those cases did this Court consider the rule "that when Congress attaches conditions to legislation waiving the sovereign immunity of the United States, those conditions must be strictly observed, and exceptions thereto are not to be lightly implied." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983). This rule has special force in cases such as this, involving claims for public funds. Cf. *Office of Personnel Management* v. *Richmond*, 110 S. Ct. 2465, 2471-2473 (1990). The rule cited by petitioners is simply another "competing canon of statutory construction" regarding statutes of repose and limitation, which must give way before the longstanding judicial policy of strictly interpreting waivers of sovereign immunity. *Block*, 461 U.S. at 288.

In any event, petitioners overstate their case when they claim that the Federal Circuit's decision "is squarely inconsistent with the established principle that statutes of limitations do not begin to run until the plaintiff could bring a claim," 91-1 Pet. 17, or "with the presumption that statutes of limitation begin to run when the rights subject to the bar have accrued," 91-34 Pet. 14. As the court of appeals

noted, petitioners had a fully adequate opportunity to file their claims in a timely manner. In 1981, the Solicitor of the Interior issued a formal opinion approving procedures pursuant to which producers faced with the problem that confronted petitioners could file requests for refunds pending resolution of a challenge to rates promulgated by FERC. See *OCSLA Refunds & Credits*, 88 Interior Dec. at 1099-1102. Indeed, at least one producer in petitioner's situation (Texaco) filed such a claim and avoided the two-year bar with respect to royalties paid in reliance on FERC's revised pricing regulations. Admin. Record, Doc. 26, App. G, *Shell Offshore Inc.* v. *United States*, No. 391-87L (Cl. Ct. 1989). Petitioners, by contrast, failed to do so. Because petitioners do not challenge the procedures for filing refund requests in these circumstances, and because they therefore concededly could have filed their claims at any time after they made payment, their right to seek a refund accrued at the time of payment. There accordingly is nothing anomalous about applying the statutory language as it is written and holding that the two-year filing period set forth in Section 1339(a) began to run when petitioners first could have filed their refund requests.

3. Petitioners also argue (91-1 Pet. 20-25; 91-34 Pet. 15-16, 25-26) that the court of appeals erroneously failed to defer to the views of the Comptroller General. In their view, Congress's 1953 enactment of OCSLA implicitly incorporated into Section 1339(a) the Comptroller General's 1941 interpretation of a prior statute, see Pet. App. 79a-89a. The short answer to this argument is that the Comptroller General's interpretation was not passed by both Houses of Congress and signed by the Presi-

dent; it is the text of the statute Congress enacted that controls. As discussed above, petitioners' arguments are inconsistent with that text.

Even if we assume *arguendo*, however, that the Comptroller General, and not the Secretary, has the power to issue authoritative interpretations of OCSLA,[6] the Comptroller General's interpretation involved a statute significantly different from Section 1339(a) and thus sheds little light on the question at hand.[7] The statute at issue was Section 2 of the Act of Dec. 11, 1919, ch. 5, 41 Stat. 366, which provided that any claim for a refund of excess sums paid for the purchase of public lands must be filed not within two years of the date of payment, but "within two years after the patent has issued for the land embraced in such payment." See Pet. App. 81a. Thereafter, the Act of June 27, 1930, ch. 642, 46 Stat. 822, extended the refund provisions of the 1919 Act to "all payments in excess of lawful requirements * * * under any statute relating to the * * * lease * * * of the public lands."

Interpreting these provisions, the Comptroller General noted that "serious difficulty arises" in applying the two-year bar to matters (like leases or licenses) arising under the 1930 statute, because no "patent" issues in connection with most of them. Pet. App.

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[6] But see 43 U.S.C. 1334(a) ("The Secretary shall administer the provisions of [OCSLA] relating to the leasing of the outer Continental Shelf, and shall prescribe such rules and regulations as may be necessary to carry out such provisions."); 43 U.S.C. 1339(a) (providing that refunds are available "when it appears to the satisfaction of the Secretary that [a person is entitled to a refund]").

[7] For discussion of this same point by the Interior Board of Land Appeals, see Pet. App. 40a.

84a. Moreover, reliance on the date on which the lease or license was issued would be unfair, "for under such a ruling a repayment of any excess paid after the second year of the life of the permit would automatically be barred." *Ibid.* The Comptroller General noted that it would be "convenient to hold that the 2-year period begins on the date the excess payment is made," but decided that "a ruling of this type would be more in the nature of legislation than interpretation." *Id.* at 85a. Recognizing the need to adopt *some* rule, the Comptroller General proceeded in these circumstances to adopt a rule that generally imposed a two-year bar running from the date the payment is made, but allowed the two-year period to be extended in certain cases until the resolution of contingencies that affect the appropriate amount of payment. See *id.* at 89a. We agree with the Comptroller General's conclusion that a ruling establishing a bright-line, two-year bar commencing on the date of payment is in the nature of legislation. Because that is precisely the legislation Congress enacted in Section 1339(a), the Comptroller General's opinion interpreting a statute that did not contain such a bar is of no relevance here.[8]

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[8] Petitioners also err in relying (91-1 Pet. 23-24; 91-34 Pet. 25-26) on the analysis of the Comptroller General and the Secretary with regard to a 1974 refund claim by Union Oil Company of California. See Memorandum from Frederick N. Ferguson, Assistant Solicitor of the Interior—Minerals, Division of Public Lands, to Director, Geological Survey (Oct. 12, 1972) (Pet. App. 68a-71a); Letter from Elmer B. Staats, Comptroller General, to Henry M. Jackson, Chairman, Senate Committee on Interior and Insular Affairs (July 8, 1974) (Pet. App. 72a-78a). In that case, the Department of the Interior itself retroactively altered the provisions of a unitization agreement with Union Oil in a way that decreased

4. Finally, petitioners contend (91-34 Pet. 22-29) that the court of appeals accorded undue deference to the Secretary's interpretation of Section 1339(a), arguing (91-34 Pet. 23) that "an agency's interpretation of a statute will not be upheld when it conflicts with a longstanding presumptive rule of statutory construction." This contention is meritless because, for the reasons discussed above (see pages 10-11, *supra*), the "longstanding presumptive rule" on which petitioners rely—that statutes of limitations generally do not run until the plaintiffs' right accrues—has no applicability here and is, in any event, satisfied, because petitioners' right to request a refund accrued immediately upon payment.

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the amount of oil revenues Union Oil should have received during the preceding years; it thus indirectly reduced the amount Union Oil should have paid the United States as royalties.

Both the Department and the Comptroller General agreed that the period in Section 1339(a) had been tolled during the period the Department was considering alteration of the unitization agreement. They relied on the general rule that payments made "under protest" toll the two-year period because they sufficiently put the Department on notice that a refund request will be filed. See Pet. App. 70a, 73a-74a. There was no such notice here. As the Solicitor of the Interior acknowledged a decade ago (*OCSLA Refunds & Credits*, 88 Interior Dec. at 1101 n.12):

> Taken out of context, some remarks in [the Union Oil decision] might seem to conflict with [the Department's] interpretation * * * . This would misinterpret [Section 1339], which sets the date of payment as the starting date. In the instances discussed by the Comptroller General, the statute was tolled on the date of the earliest payment. Thus, no time had yet run when the statute resumed following the decision.

In light of the Solicitor's long-standing explanation, petitioners err in relying on the disposition of the Union Oil matter.

In any event, as the court of appeals made clear, its decision did not rest on deference to the administrative construction of ambiguous provisions of federal law; it rested on the court's independent determination that the agency's construction was the only one that accorded with the statute's "clear meaning." Pet. App. 5a. Further review therefore is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1991

PHILLIPS PETROLEUM CO., CHEVRON U.S.A. INC., and CONOCO INC., PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PHILLIPS PETROLEUM CO., CHEVRON U.S.A. INC., and CONOCO INC., PETITIONERS

v.

UNITED STATES OF AMERICA, RESPONDENT

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR THE PETITIONERS

In our petition for certiorari, we demonstrated that the interpretation of Section 10(a) of the Outer Continental Shelf Lands Act adopted by the Federal Circuit deviates dramatically from the heretofore uniform body of law construing statutes of limitations. We also explained that that interpretation will have absurd and unfair results: whenever gas ceiling prices are retroactively reduced more than two years after the making of a royalty payment based on such prices, the payor's claim for a refund will be time barred before the claim even accrues.

The government does not deny that its interpretation of Section 10(a) will bar the refund claims of payors before they have any right to a refund. Nor does it contest the general rule that statutes of limitations do not begin to run until the underlying claim accrues. Instead, it relies largely on boilerplate statements about plain meaning and waivers of sovereign immunity to bolster its implicit contentions that Section 10(a) is different from all other statutes of limitations and that Congress really did intend to provide the MMS with a windfall whenever

gas prices are retroactively reduced more than two years after the royalty payments based upon them have been made.[1] Its express arguments are as misguided as its implicit ones.

1. The government begins by asserting (Br. in Opp. 7) that the phrase "two years after the making of the payment" is susceptible to only one interpretation: the two-year period runs from the time of the royalty payment, regardless of whether that payment is in the amount required by law at the time it is made. This reading is far from plain; indeed, *both* courts below rejected it. Applying the well-established principle that words in a statute cannot be parsed in isolation, but instead must be read in context, both the Claims Court and the Federal Circuit concluded that the term "payment" means "excess payment." Pet. App. 5a, 17a.[2] The lower courts simply disagreed on when an "excess payment" occurs. Thus, Section 10(a) hardly can be read as unambiguously dictating that an excess payment occurs at the time of the royalty payment even if the payment is *not* then excessive.

Of course, even if the meaning of Section 10(a) were as "plain" as the government contends, that would not end the inquiry. This Court has made clear on countless occasions that when the literal interpretation of a statute will yield absurd results, that interpretation must give way to a more sensible reading. See, *e.g.*, *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 454-455 (1989); *United States* v. *American Trucking Ass'ns, Inc.*,

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[1] There can be little doubt that when gas ceiling prices are retroactively *increased*—as they were when FERC adopted the dry rule—MMS would insist that it has a right to 12½% of the retroactive payments no matter how many years had elapsed.

[2] See, *e.g.*, *International Primate Protection League* v. *Administrators of Tulane Educ. Fund*, 111 S. Ct. 1700, 1705 (1991) ("We continue to recognize that context is important in the quest for a word's meaning and that statutory construction is a holistic endeavor.") (brackets, ellipses, internal quotation marks, and citations omitted).

310 U.S. 534, 543 (1940); *United States* v. *Ryan*, 284 U.S. 167, 175 (1931). As we explained in our petition for certiorari (at 25-28), that manifestly is the case here.

2. The government next contends (Br. in Opp. 8, 10) that Section 10(a) should be construed narrowly because that provision is a waiver of sovereign immunity. It neglects the admonition contained in the very case upon which it relies, however, that while courts should not interpret statutes of limitations in a manner that would "extend the waiver beyond that which Congress intended," they "should not construe such a time-bar provision unduly restrictively" either. *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983) (internal quotation marks omitted). See also *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979) (in construing statutes of limitations for claims against the United States, courts should not "assume the authority to narrow the waiver [of sovereign immunity] that Congress intended").

The interpretation of Section 10(a) espoused by the government and adopted by the Federal Circuit is just the kind of unduly restrictive interpretation the Court warned about in *Block*, particularly in view of the fact that Congress gave *no* indication that it intended to bar claims before they accrued. See *United States* v. *Wurts*, 303 U.S. 414, 418 (1938).[3] Indeed, as we explained in the petition (at 22), the legislative history of Section 10(a) indicates that Congress merely intended to tailor an earlier statute—which had been authoritatively interpreted to permit refund claims within two years of the

[3] The government contends (Br. in Opp. 9) that its narrow reading of Section 10(a) is compelled by the "very purpose" of that provision—"to establish repose and protect the fisc." But here, and in every other case in which a judicial decision, FERC order, or congressional enactment retroactively reduces gas ceiling prices, the government will have had actual notice that that contingency might occur. Accordingly, the kinds of concerns that come into play with long-overlooked accounting errors are entirely absent when, as here, the royalty payments at issue were in the amount required by law at the time they were made.

time a royalty payment becomes excessive—to the context of outer continental shelf royalty payments.

The government also is wrong in asserting (Br. in Opp. 10) that because this case is against the federal government "none" of the many cases we cited in support of the basic proposition that statutes of limitations do not begin to run until the underlying claim has accrued "has any relevance."[4] As early as a century ago, this Court applied that rule in a case against the United States. See *United States* v. *Louisiana*, 123 U.S. 32, 37 (1887) (time for bringing action for payment of moneys received by United States from sale of swamp land within a state runs from time that swampy character of lands is determined administratively, not from the date of the sale). More recently, this Court held that the same equitable tolling principles that apply in private litigation apply in litigation against the government. *Irwin* v. *Veterans Admin.*, 111 S. Ct. 453, 457 (1990). As the Court explained, "[s]uch a principle is likely to be a realistic assessment of legislative intent as well as a practically useful principle of interpretation." *Ibid.* Plainly, *Irwin* indicates that general principles for construing statutes of limitations apply regardless of whether the defendant is a private party or the United States.[5]

Notwithstanding the government's contention (Br. in Opp. 10), *United States* v. *Dalm*, 110 S. Ct. 1361 (1990), does not suggest otherwise. In *Dalm*, a taxpayer sought to treat a payment to her as a gift rather than as income

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[4] The government does not—and cannot—attempt to excuse the Federal Circuit's erroneous gloss on the discovery rule on this ground. See Pet. 17-19. That rule plainly applies with full force to claims against the government. See *Kubrick*, 444 U.S. at 120-123 & n.7.

[5] Indeed, the Ninth Circuit recently applied *Irwin* to hold that the 15-day period for challenging federal timber sales was equitably tolled by enactment of a federal statute that purported to eliminate the basis for such challenges. See *Seattle Audubon Soc'y* v. *Robertson*, 931 F.2d 590 (9th Cir. 1991).

for tax purposes. The IRS reached a contrary conclusion and assessed an income tax deficiency. After settling the deficiency, she sought return of the gift tax she had paid. This Court held that the Tax Court lacked jurisdiction to adjudicate her claim because the statute of limitations, which required claims to be filed within two years of the time the tax at issue was paid, had expired. In so holding, the Court concluded that the statute of limitations ran from the date the taxpayer paid her gift tax, not from the date that the gift tax payment was determined to be in error. *Id.* at 1369 n.7.

Dalm is perfectly consistent with the rule that statutes of limitations do not begin to run until the plaintiff can pursue a claim. In *Dalm*, the taxpayer's *voluntary* decision to treat the payment as a gift was erroneous *ab initio*. *Dalm* had a right to a refund from the moment she paid the gift tax. Consequently, her claim was not barred before it accrued. Here, by contrast, petitioners had *no* right to a refund at the time they made their royalty payments. Those payments were correct—and required by law—at the time they were made. Petitioners did not have any right to a refund until after the ceiling price of gas was retroactively reduced and they were ordered to make refunds to their customers.[6] Accordingly, the Court's conclusion that the statute of limitations began to run at the time Dalm paid her gift tax is inapposite here.[7]

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[6] *Dalm* would be like this case if the taxpayer had been *required* to treat the payment as a gift under IRS regulations, but then was required to pay income tax on it as a result of legislation retroactively overturning the IRS regulations.

[7] The government has improperly recast the question presented to make this case seem like *Dalm* (Br. in Opp. I), when in fact it is quite different. The Claims Court did not hold—and we have never asserted—that the two-year period runs from the date a royalty payor realizes (whether after a judicial decision or otherwise) that a payment was "incorrect." (Indeed, we expressly disclaimed that position in our petition for certiorari (at 4 n.1).) Rather, the question here is whether the two-year period runs from the date a judi-

3. The government argues in the alternative (Br. in Opp. 10-11) that petitioners' "right to seek a refund" accrued at the time they made their royalty payments. This contention is doubly flawed.

To begin with, the government's implicit assumption—that it is the right to file a protective notice rather than the actual right to obtain a refund that matters for accrual purposes—is absurd. As the numerous cases cited in the petition (at 14-16, 27-28) make absolutely clear, the rule is that statutes of limitations do not begin to run until *all* events necessary to state a claim have occurred: the availability of a notice procedure is irrelevant. Remarkably, the government does not even attempt to reconcile its position with *Wurts*, *Woods*, *Crown Coat*, and the other decisions discussed in the petition.

In any event, the government exaggerates greatly in asserting (Br. in Opp. 11) that "petitioners had a fully adequate opportunity to file their claims in a timely manner"—*i.e.*, the protective filing mechanism established in the December 1981 opinion of the Solicitor of the Interior. The very fact that the government can point to only one major producer (Texaco) that complied with its assertedly adequate procedures—as opposed to the numerous others that did not—is compelling circumstantial evidence that those procedures were not adequate.[8]

The reason the procedures were inadequate is the inherent Catch-22 that the Solicitor of Interior's opinion created. On the one hand, the opinion indicated that producers who believed that a legal challenge to gas prices

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cial decision, regulatory action, or legislative enactment renders a formerly *correct* payment excessive.

[8] For similar reasons, the government is wrong in concluding (Br. in Opp. 7) that because producers did not make very many protective filings in the decade following publication of the Solicitor of Interior's opinion, our prediction that the Federal Circuit's opinion will result in a flood of protective filings is unlikely to come true.

might give them a right to a refund of royalty payments "can interrupt the [two-year limitations] period by notifying the Department in writing of the challenge and of the approximate difference in the price should the challenge succeed." *Refunds and Credits Under the Outer Continental Shelf Lands Act*, 88 I.D. 1090, 1102 (1981).[9] On the other hand, the opinion stated that every refund request "must give the Department enough information to rule on it," including "the amount requested and the basis for the request." *Id.* at 1099 & n.10 (internal quotation marks omitted). According to the opinion, requests that "do not ask for specific amounts or give reasons why the payments are excessive" do not constitute "requests" and therefore do not operate to stop the running of the statute of limitations. *Id.* at 1100.

Any producer that filed a claim as suggested by the Solicitor of Interior thus risked having it rejected as inadequately specific. This is not mere conjecture. MMS rejected a notice filed by Union Oil Company—which referred to the *INGAA* challenge and indicated that the case could reduce gas prices by approximately 2%—as failing to meet the specificity requirement contained in the Solicitor of Interior's opinion. See *Shell Offshore, Inc.*, 96 I.B.L.A. 149, 168-169 & n.9 (1987) (reversing MMS' rejection of Union Oil's claim). Accordingly, it is no wonder that so few legally sophisticated producers filed protective notices during the *INGAA* litigation.

4. The government's attempt to downplay the relevance of the 1941 opinion of the Comptroller General is similarly deceptive. The government first asserts (Br. in Opp. 12) that the opinion is irrelevant because it involved a different statute. As we explained in the petition (at 22),

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[9] The opinion does not say how the two-year period can be "interrupt[ed]" if it already has expired before the royalty payor learns of a contingency that might result in a retroactive change in gas prices. This was the case with the 1971 FPC order retroactively changing the price of gas for the years 1962 through 1970. See Pet. 25-26.

however, that statute was the direct predecessor of Section 10(a), and the legislative history unambiguously reveals that in enacting Section 10(a) Congress had no intention to effect a substantive change. Thus, the Comptroller General's authoritative interpretation of the predecessor provision—which was fully consistent with well-established principles governing the interpretation of statutes of limitations—is more than just relevant; it is deemed incorporated within Section 10(a). See Pet. 22-23 & n.10.

Next, the government quotes extensively from the Comptroller General's opinion in an effort to show that the reason the Comptroller General did not hold that the two-year limitations period ran from the date of payment was that "a ruling of this type would be more in the nature of legislation than interpretation." Br. in Opp. 12-13. The government suggests that in enacting Section 10(a), Congress did what the Comptroller General thought he was precluded from doing under separation of powers principles. The government badly misreads the Comptroller General's opinion.[10]

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[10] The government also misreads the Comptroller General's 1974 letter applying the principles set forth in the 1941 opinion to Section 10(a). See Br. in Opp. 13-14 n.8. In particular, it asserts that the basis for the Comptroller General's conclusion that the two-year limitations period ran from the time the unitization agreement was approved was the fact that the royalty payments were made under protest. However, nothing in the Comptroller General's letter indicates that the payments in fact were made under protest or that that was the basis for the Comptroller General's conclusion. (Perhaps the government was confused by the opinion's reference to a 1965 case in which the payments *were* made under protest.) Rather, his reason can be found in the very fairness concerns that motivated the 1941 opinion as well as the interpretation of Section 10(a) adopted by the Claims Court here:

> The primary basis for the conclusion reached in our decision of November 5, 1965 * * * was the fact that the claim was filed within two years of the date upon which it could first be determined that excess royalty payments had, in fact, been made. Similarly, in the instant case Union's application was filed

To begin with, *every* passage quoted by the government is from the Secretary of Interior's letter requesting the Comptroller General's opinion, which was quoted at length at the beginning of the opinion, and not from the opinion itself. The Comptroller General's opinion in fact neither agreed nor disagreed with the Secretary's assumption that holding that the two-year period should run from the date of payment was legislative action outside of the Comptroller General's authority.

Of equal importance, in selectively quoting the Secretary's letter, the government ignores the Secretary's principal reason for opposing the use of the date of payment as a triggering date: such an interpretation "would work an injustice in cases wherein the occurrence of the excess payments could not have been determined by the payor, even with due diligence on his part, until more than two years had elapsed." 20 Comp. Gen. 734, 736 (1941) (91-34 Pet. App. 85a). Indeed, it is for that very reason that the Secretary proposed that, in cases not involving land patents, the predecessor to Section 10(a) should be construed to impose *no* statute of limitations for requesting a refund of excess payments. 20 Comp. Gen. at 737. The Comptroller General rejected this open-ended approach in favor of one that better accommodated the various competing interests: the two-year period begins to run from the date a subsequent event renders a previously accurate payment excessive. *Id.* at 739. That was the authoritative interpretation in force at the time that Congress enacted Section 10(a) without any intention to effect a substantive change from existing law.

In sum, none of the government's arguments justify the counterintuitive, unfair interpretation of Section

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within two years of the date the Unit Agreement was approved, and it was only at this time that the amount or, for that matter, even the existence of an overpayment became known.

Letter from Comptroller General Elmer B. Staats to Senator Henry M. Jackson (July 8, 1974) (91-34 Pet. App. 74a).

10(a) adopted by the court of appeals. Because that interpretation conflicts with numerous decisions of this Court construing statutes of limitations, the petition for certiorari should be granted.

Respectfully submitted.

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